89-1020

No. _____

In The

Supreme Court of the United States

October Term, 1989

ANDONIS MORFESIS,

Petitioner,

v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

HERALD PRICE FAHRINGER
Counsel of Record
DIARMUID WHITE
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
540 Madison Avenue
New York, New York 10022
(212) 751-1330

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the notice requirement of the Due Process Clause is the same for criminal contempt proceedings as for civil proceedings generally?

2. When a proceeding to punish a person for criminal contempt is commenced by service of process, whether the notice component of the Due Process Clause requires personal delivery of the process to the alleged contemnor?

3. Whether the Due Process Clause permits a person to be tried by a judge and sentenced to seven consecutive thirty-day jail terms for criminal contempt due to noncompliance with previous orders, where that person has not been personally served with the process commencing the criminal contempt proceedings, has not otherwise been directed to appear, and does not appear in court, and where there is no evidence that he was actually aware of the contempt proceedings?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the same as in the caption.

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No. _____

In The

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October Term, 1989

ANDONIS MORFESIS,

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v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Petitioner respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, entered in this proceeding on May 4, 1989.

OPINIONS BELOW

The order of the Supreme Court of the State of New York, Appellate Division, First Department, decided without opinion, is reported *sub nom. Department of Housing Preservation and Development of the City of New York v.*

24 West 132 Equities. Inc., at ___ A.D.2d ___, 540 N.Y.S.2d 711, ___ N.E.2d ___ (lst Dept. 1989), and is reprinted in the appendix at App. 30. The opinion of the Supreme Court of the State of New York, Appellate Term, First Department, is reported *sub nom. Department of Housing Preservation and Development of the City of New York v. 24 West 132 Equities, Inc.*, at 137 Misc.2d 459, 524 N.Y.S.2d 324, ___ N.E.2d ___ (App. Term lst Dept. 1987), and is reprinted in the appendix at App. 1; two related per curiam opinions of the Appellate Term are unreported and are reprinted in the appendix at App. 6 and App. 8. Three opinions of the Civil Court of the City of New York, New York County, are unreported and are reprinted in the Appendix at App. 10, App. 19 and App. 25.

JURISDICTION

The order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming three orders of the Supreme Court of the State of New York, Appellate Term, First Department, in turn affirming seven orders of the Civil Court of the City of New York, New York County, adjudging Petitioner in civil and criminal contempt and imposing sentence, was entered on May 4, 1989. A timely motion for leave to appeal to the New York Court of Appeals was denied by the Appellate Division by order entered on October 24, 1989. (App. 33) This petition for a writ of certiorari is filed within sixty days of that order in compliance with Rules 20.1 and 20.2. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

New York Civil Practice Law and Rules: Section 308.

[Reprinted in Appendix at App. 35.]

New York City Civil Court Act: Section 110.

[Reprinted in Appendix at App. 37.]

STATEMENT OF THE CASE

Petitioner seeks review of an order of the New York Supreme Court, Appellate Division, First Department, entered May 4, 1989, affirming without opinion orders of the Appellate Term, First Department, entered December 8, 1987, December 23, 1987 and January 7, 1988, respectively, in turn affirming seven orders of the Civil Court of the City of New York, New York County, each adjudging Petitioner in civil and criminal contempt and sentencing him to consecutive thirty-day jail terms for criminal contempt.

In 1986, the year relevant to the questions presented in this petition, New York's Civil Practice Law and Rules

("CPLR") permitted "personal service" of civil process by delivering it to a person of suitable age and discretion at the actual place of business, dwelling place or abode of the person to be served and mailing it to his last known residence – commonly known as "leave and mail" service. *See* CPLR § 308(2).[1] (App. 35) No prior diligent effort to deliver the papers to the person to be served was required. The New York City Civil Court Act ("NYCCCA") permitted, and still permits, "leave and mail" service, in certain enumerated housing matters, at an address registered with Respondent Department of Housing Preservation and Development ("HPD") as the address of the person responsible for the maintenance of a particular multiple dwelling, rather than at the actual place of business and last known residence of the person to be served. *See* NYCCCA § 110(m). (App. 42)

In the instant case, service of orders to show cause commencing *civil and criminal contempt proceedings* in the Civil Court, Housing Part, against Petitioner and other named respondents was made, under the authority of CPLR § 308(2) and NYCCCA § 110(m), by "leave and mail" service to an address registered with HPD for seven particular multiple dwellings. The orders to show cause alleged that the respondents had failed to comply with orders of the Civil Court, Housing Part, to supply

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[1] CPLR § 308(2) was amended in 1987 to permit, in "leave and mail" service, mailing the summons to the person's actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside that the communication is from an attorney or concerns an action against that person.

adequate heat and hot water to various buildings. Petitioner was never personally served with the orders to show cause, and there was no evidence that he had actual notice of the proceedings. An attorney did appear on behalf of the collective respondents, which included corporate ones, but there was no indication that the attorney was expressly or implicitly authorized to appear on behalf of Petitioner personally. Petitioner himself never appeared in court at any stage of the proceedings.

Following three contempt trials before the housing judge, at which Petitioner was not present, the court issued two opinions dated August 6, 1986, encompassing six of the seven underlying proceedings, and rejected the respondents' challenge to the adequacy of the service of the order to show cause commencing the contempt proceedings (App. 15-16, App. 21-22), ruling that "New York City Civil Court Act § 110(m) is a valid exercise of the State's power to insure that parties receive proper notice of proceedings" (App. 21). The judge concluded that Petitioner willfully failed to comply with the underlying orders and was guilty of civil and criminal contempt. (App. 17, 22-23) In an opinion dated August 11, 1986, the court reached the same conclusion with respect to the seventh proceeding. (App. 28)

Although the underlying proceedings giving rise to the contempt litigation were originally seven in number, Respondent HPD had moved successfully to consolidate five of them, and the Civil Court housing judge consolidated all seven contempt matters into one sentencing hearing on August 13, 1986. Petitioner did not appear at that hearing. On the following day, the court issued the

first of a series of seven orders, imposing seven consecutive thirty-day jail terms on Petitioner for criminal contempt. Other than the orders to show cause that commenced the proceedings, there was never any order, summons, appearance ticket or other directive requiring Petitioner to appear or advising him of the proceedings.

Petitioner appealed to the Appellate Term from the orders imposing the seven consecutive thirty-day jail terms,[2] contending that personal delivery of process is required in criminal contempt proceedings and abandonment of that requirement collides with basic due process rights. (App. 45) The Appellate Term, however, in an opinion encompassing five of the contempt proceedings, held that "[t]he method of service employed in this proceeding, one of the methods delineated in the New York statute governing service in civil actions generally, was one reasonably calculated under all the circumstances to apprise respondent of the pendency of the action," citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). (App. 5) The opinion further stated: "[T]he criminal contempt statute in New York provides for a maximum jail term of 30 days (Judiciary Law, §751, subd. 1), a contempt which would be considered 'petty' under *Bloom [v. Illinois*, 391 U.S. 194, 201 (1986)], and does not implicate the constitutional guarantees otherwise applicable to the trial of a serious crime."[3] (App. 4) The orders in

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[2] The orders were stayed by the state appellate courts and remain stayed pending determination of this petition.

[3] The opinion erroneously recites in its opening paragraph that Petitioner was sentenced to a definite term of thirty days. Actually, the appeal decided by that particular opinion encompassed *five* thirty-day terms, to run consecutively.

the two remaining contempt proceedings were affirmed by the Appellate Term in two subsequent per curiam opinions which cited to the foregoing opinion. (App. 7, 9) The Appellate Term, however, granted Petitioner leave to appeal to the Appellate Division.

In the Appellate Division, where all seven contempt proceedings were consolidated, Petitioner again maintained that, to punish for criminal contempt, personal delivery of process to the alleged contemnor himself is required by the Due Process Clause, particularly where a person is sentenced to seven consecutive thirty-day jail terms. (App. 46) The Appellate Division, however, affirmed the Appellate Term orders without opinion. (App. 30) The court subsequently denied Petitioner's application for leave to appeal to the New York Court of Appeals, but did stay the contempt orders pending filing and determination of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The adequacy of notice afforded by state service-of-process statutes and the constitutional requirements for criminal contempt proceedings are two evolving lines of law that intersect in this case. Although the Court has noted generally that criminal procedure protections are required in criminal contempt proceedings, *see e.g., Hicks v. Feiock*, 108 S. Ct. 1423, 1430 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 2133 (1987), the Court has not determined what degree of notice is required in criminal contempt

proceedings.[4] Since the state courts held in Petitioner's case that the notice required for criminal contempt proceedings is the same as for civil proceedings generally, the Court should review that determination and decide whether it comports with the Due Process Clause.

This Court has been vigilant in policing the adequacy of state service-of-process statutes, *see, e.g., Greene v. Lindsey,* 456 U.S. 444 (1982)(Kentucky statute permitting service of process in forcible entry and detainer actions by posting a summons "in a conspicuous place on the premises" did not satisfy the requirements of the Due Process Clause). The Court has also been sensitive to protecting federal constitutional rights in the context of criminal contempt proceedings, *see, e.g., Hicks v. Feiock,* 108 S.Ct. at 1430 (distinguishing between civil and criminal contempt and noting "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires for such criminal proceedings"); *Codispoti v. Pennsylvania,* 418 U.S. 506 (1974) (jury trial required where criminal contempt sentences imposed were to be served consecutively and aggregated more than six months).

In *Hicks v. Feiock,* the Court noted that for purposes of applying the Due Process Clause and other provisions of the Constitution to contempt proceedings, it is necessary to classify the relief imposed in such a proceeding as

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[4] In *Cooke v. United States,* 267 U.S. 517 (1925), the Court stated generally that due process of law in the prosecution of contempt requires that the accused be advised of the charges and have a reasonable opportunity to meet them. *Id.* at 537.

civil or criminal in nature. 108 S.Ct. at 1429. However, "the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Id.* It is the substance of the proceeding and the character of the relief that is critical. *Id.* In civil contempt, the punishment is remedial, for the benefit of the complainant; in criminal contempt, the sentence is punitive, to vindicate the authority of the court. *Id.*

The *Hicks* Court stated that these distinctions lead up to "the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires for such criminal proceedings." *Id.* at 1430. The Court pointed out that if only civil coercive remedies had been imposed, it would be improper to invalidate that result "merely because the Due Process Clause, as applied in *criminal* proceedings, was not satisfied." *Id.* at 1433 (emphasis in original).

Although not addressing the question of notice in criminal contempt proceedings directly, the *Hicks* Court did observe:

> This can also be seen by considering the notice given to the alleged contemnor. This Court has stated that one who is charged with a crime is "not only entitled to be informed of the nature of the charge against him but to know that it is a charge and not a suit." *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 446, 31 S.Ct. 492, 500, 55 L.Ed. 797 (1911). Yet if the relief ultimately given in such a proceeding is wholly civil in nature, then this requirement would not be applicable.

Id. n. 10. Thus, contrary to the state courts' analysis that the method of service employed here was "one of the methods delineated in the New York statute governing service in civil actions generally [and] was one reasonably calculated under all the circumstances to apprise respondent of the pendency of the action" (App. 5), due process requires more heightened notice in a criminal contempt proceeding than in civil actions generally. Leave and mail service to an address registered with HPD does not satisfy that heightened standard.[5] Indeed, the notice here was actually *less* than that given in an ordinary civil lawsuit in New York, since, under the asserted authority of NYCCCA § 110(m), HPD did not even deliver process to Petitioner's "actual place of business, dwelling place or usual place of abode" and mail it to his "last known residence," as would be required by CPLR § 308(2).

Where criminal sanctions may be imposed, resulting in the loss of liberty, the best means of notice must be

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[5] The Appellate Term held that no heightened notice was required because:

> [T]he separate proceedings to punish for criminal contempt has traditionally been viewed in New York as a *civil* special proceeding, notwithstanding the necessity that the accused be shown to have violated the underlying order with a higher degree of willfulness than is required in a civil contempt proceeding. In consequence, the rules of *civil* rather than criminal procedure should govern the origination of the criminal contempt application.

(App. 3-4; citations and footnote omitted; emphasis in original.)

given to the accused, not merely notice "reasonably calculated" to apprise him of the pendency of the action. The United States Court of Appeals for the Second Circuit, in *United States v. Tortora*, 464 F.2d 1202, 1209 (2d Cir.), *cert. den. sub nom. Santoro v. United States*, 409 U.S. 1063 (1972), set forth this requirement succinctly in the context of a person accused of a federal crime:

> Before a trial may proceed in the defendant's absence, the judge must find that the defendant has had adequate notice of the charges and proceedings against him. Notice is initially given to a defendant by issuance of an indictment. But not until the defendant answers the indictment by pleading in open court to the charges therein can a court know with certainty that the defendant has been apprised of the proceedings begun against him. Thus no defendant can be tried until after he has personally entered a plea to the charge. It must clearly appear in the record, however, that the defendant was advised when proceedings were to commence and that he voluntarily, knowingly, and without justification failed to be present at the designated time and place before the trial may proceed in his absence.

Id. at 1209; *see also* New York Criminal Procedure Law ("CPL") § 170.10(2) (person charged with misdemeanor must be personally present at arraignment, must be informed by court of charges against him, and must be furnished with copy of accusatory instrument). At the very least, therefore, the failure to deliver the order to show cause to Petitioner personally constituted a denial of due process. *Cf.* CPL § 150.40(2)("An appearance ticket, other than one issued for a traffic infraction related to parking, must be served personally"); *People v. Turkel*,

130 Misc. 2d 47, 494 N.Y.S.2d 984, ___ N.E.2d ___ (Crim. Ct. N.Y. Co. 1985) (personal delivery of criminal summons is required under CPL § 130.40).

Moreover, even if personal, in-hand delivery of process to the alleged contemnor were not required in every criminal contempt proceeding, it was required here, since seven consecutive thirty-day jail terms were imposed on petitioner following the sentencing hearing. The Appellate Term, losing sight of the fact that the sentences here were to run consecutively, incorrectly focused only on the thirty-day jail term for criminal contempt authorized by New York Judiciary Law § 751, and held that such a contempt is "petty" under *Bloom v. Illinois*, 391 U.S. 194, and "therefore does not implicate the constitutional guarantees otherwise applicable to the trial of serious crimes." (App. 4) A "serious" crime has been defined by the Court as one with a prison sentence longer than six months. *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (sentence longer than six months triggers right to jury trial).

In *Codispoti v. Pennsylvania*, 418 U.S. 506, the Court held that, even though no sentence for more than six months was imposed for any one act of criminal contempt, a jury trial was required where the sentences imposed were to be served consecutively and aggregated more than six months. Codispoti had been charged with and convicted of seven separate contempts occurring on different dates. 418 U.S. at 507 n. 1. The judge imposed a separate six-month sentence for each contempt "but also determined that the sentences were to run consecutively rather than concurrently, a ruling which necessarily extended the prison term beyond that allowable for a

petty criminal offense." *Id.* at 516. The Court therefore reversed the contempt convictions.

Here, where the consecutive sentences imposed on Petitioner exceeded six months in the aggregate, he was entitled to the constitutional guarantees applicable to serious crimes. Consequently, putting aside whether he was entitled to a jury trial, he was at the very least entitled to the due process that one charged with a serious misdemeanor or a felony would receive. This includes, at minimum, personal notification of the charge. In the context of this case, such notification should have been given by personal delivery of the order to show cause to Petitioner. Failure to do so denied Petitioner due process.

This Court should therefore grant certiorari to determine what notice was required to be given in the criminal contempt proceedings here and in criminal contempt proceedings generally.

CONCLUSION

The Petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, should be granted.

Dated: New York, New York
December 21, 1989

Respectfully submitted,

HERALD PRICE FAHRINGER
Counsel of Record
DIARMUID WHITE
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
540 Madison Avenue
New York, NY 10022
(212) 751-1330

Attorneys for Petitioner

[Opinion of the Appellate Term in *Department of Housing v. 24 West 132 Equities, Inc., et ano*]

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

NOVEMBER 1986

PRESENT: HON. JAWN A. SANDIFER, J.P.
HON. STANLEY PARNESS
HON. STANLEY S. OSTRAU

Justices.

DEPARTMENT OF HOUSING PRESERVATION, AND DEVELOPMENT OF THE CITY OF NEW YORK,	
Petitioner-Respondent,	
-against-	#86-654
24 WEST 132 EQUITIES, INC.,	
Respondent,	
-and-	
ANDONIS MORFESIS,	
Respondent-Appellant.	

Respondent Andonis Morfesis appeals from an order of the Civil Court, New York County, entered August 14, 1986 (Lewis Friedman, H.J.) which, after a trial, adjudged respondent in civil and criminal contempt, and sentenced respondent to a definite term of 30 days.

PER CURIAM:

Order entered August 14, 1986 (Lewis Friedman, H.J.) affirmed, with $10 costs.

The underlying proceedings, brought by petitioner Department of Housing Preservation and Development (HPD) for heat and hot water violations at building premises allegedly owned or controlled by respondent Morfesis, resulted in the entry of default judgments which imposed civil penalties and directed respondent to provide essential services as required by law. No motion was made to vacate those defaults. Subsequently, petitioner moved to hold respondent in civil and criminal contempt because of the continued absence of adequate heat and hot water at the buildings involved. The order to show cause, permitting service under CPLR 308, was not personally delivered to respondent (CPRL 308[1]), but rather was left with a person of suitable age and discretion at respondent's business office and mailed to his last known residence as registered with HPD (CPLR 308[2]). After a hearing on the contempt applications (at which respondent was represented by counsel), the Housing Court determined that the conditions in the subject premises were "absolutely deplorable" and that there was "no doubt whatever" that respondent's acts in failing to provide heat or hot water were willful. Accordingly, respondent was adjudged in civil and criminal contempt and, on the latter, sentenced to a jail term of 30 days.

Our review of the testimony taken from tenants and HPD inspectors regarding conditions at the buildings satisfies us that petitioner established beyond a reasonable doubt that respondent was guilty of willful and

deliberate disobedience of the court's underlying mandates. The principal issue raised here is that the jurisdiction requisite to support a criminal contempt conviction was not obtained. Respondent argues that inasmuch as a criminal contempt proceeding is essentially a criminal prosecution in all material respects, the contemnor is entitled to the process due any criminal defendant, i.e., personal and actual notice of the charges against him. In respondent's view, service of the order to show cause bringing on the contempt application must be by personal, in-hand delivery, and a petitioner may not resort to the other alternatives specified in the CPLR which confer jurisdiction in a civil action.

It is well settled that a proceeding to punish for a criminal contempt of court arising out of or during the trial of a civil action commences a special proceeding which is separate and distinct from the original action (Board of Education v. Pisa, 54 AD2d 821; Matter of Murray, 98 AD2d 93). Hence, jurisdiction must be acquired anew. But, contrary to respondent's argument, the separate proceedings to punish for a criminal contempt has been traditionally viewed in New York as a *civil* special proceeding (Matter of Douglas v. Adil, 269 NY 144, 146), notwithstanding the necessity that the accused be shown to have violated the underlying order with a higher degree of willfulness than is required in a civil contempt proceeding.[1] In consequence, the rules of

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[1] It is true that insofar as "serious" criminal contempts are concerned, where the contemnor is subject to extended incarceration, constitutional provisions mandating a jury trial in

(Continued on following page)

civil rather than criminal procedure should govern the origination of the criminal contempt application (Siegel, New York Practice, § 484, p. 650).

As previously observed by Judge Friedman in his extensive analysis of the subject (see Department of Housing Preservation and Development v. Arick, 131 Misc.2d 950), while the cases uniformly utilize the term "personal service" as a jurisdictional predicate for criminal contempt (e.g., Lu v. Betancourt, 116 AD2d 492; Matter of Murray, 98 AD2d 93, 98; People v. Balt, 34 AD2d 932), there is no appellate case expressly holding that personal delivery of the order to show cause is the only permissible means of commencing a criminal contempt proceeding, or holding that statutory alternatives to in-hand delivery are jurisdictionally infirm (but cf. State of New York v. International Conference of Police Associations, 98 Misc.2d 1052). Many of the cases in which service has not been upheld involved situations where service was made only upon the contemnor's attorney or others unconnected with the contemnor (Department of Housing v. Arick, supra, p. 955, and cases cited therein). Here, personal service upon respondent was effected in compliance with the "leave and mail" provision of CPLR 308. Personal delivery of process, as a heightened form of notice, is of course always preferable, but due process

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(Continued from previous page)

criminal prosecutions are implicated (Bloom v. Illinois, 391 U.S. 194). However, the criminal contempt statute in New York provides for a maximum jail term of 30 days (Judiciary Law, § 751, subd. 1), a contempt which would be considered "petty" under Bloom, and which does not implicate the constitutional guarantees otherwise applicable to the trial of serious crimes.

does not require it in special proceedings such as this one so long as the party charged is notified of the accusation and is afforded a reasonable time to defend (Judiciary Law § 751, subd. 1; Cooke v. United States, 267 U.S. 517, 537). In the particular context of contempts not committed in the immediate presence of the court, it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders. The method of service employed in this proceeding, one of the methods delineated in the statute governing service in civil actions generally was one reasonably calculated under all the circumstances to apprise respondent of the pendency of the action (see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314). Jurisdiction over the respondent's person was, therefore, lawfully obtained. The designated housing judges who preside in the housing part of Civil Court are officers of that court and are expressly authorized by statute to punish for contempts in the same manner as civil court judges (CCA §§ 110[e]; see also, Judiciary Law § 757). In light of the housing part's expansive jurisdiction over proceedings to enforce proper housing standards (CCA § 110[c]), and the unrestricted conferral of the contempt power upon the specialized judges of that part, it is fair to conclude that the Legislature intended for those judges to adjudicate both civil and criminal contempt applications arising out of the civil proceedings commenced in the part.

I concur /s/ I concur /s/ I concur /s/

[Opinion of the Appellate Term in *Department of Housing v. Chance Equities, Inc., et al.*]

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

JANUARY 1987

PRESENT: HON. STANLEY PARNESS, J.P.
HON. JAWN A. SANDIFER
HON. STANLEY S. OSTRAU
Justices.

DEPARTMENT OF HOUSING PRESERVATION, AND DEVELOPMENT OF THE CITY OF NEW YORK,	
Petitioner-Respondent,	
-against-	#87-047
CHANCE EQUITIES, INC., and MARIA MORFESIS,	
Respondents,	
-and-	
ANDONIS MORFESIS,	
Respondent-Appellant.	

Respondent Andonis Morfesis appeals from an order of the Civil Court, New York County, entered October 8, 1986 which, after a hearing (Lewis Friedman, H.J.) adjudged respondent in civil and criminal contempt, and sentenced respondent to a definite term of 30 days.

PER CURIAM:

Order entered October 8, 1986 (Lewis Friedman, H.J.) affirmed, with $10 costs (see Department of Housing Preservation and Development v. 24 West 132 Equities, Inc., NYLJ, December 11, 1987, p. 12).

I concur /s/

I concur /s/

I concur /s/

[Opinion of the Appellate Term in *Department of Housing v. 232 West Associates, et al.*]

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

MARCH 1987

PRESENT: HON. XAVIER C. RICCOBONO, J.P.
HON. JAWN A SANDIFER
HON. STANLEY PARNESS
Justices.

DEPARTMENT OF HOUSING PRESERVATION, AND DEVELOPMENT OF THE CITY OF NEW YORK,	:	
Petitioner-Respondent,	:	
-against-	:	#87-141
232 WEST ASSOCIATES and JOSEPH COLON,	:	
Respondents,	:	
-and-	:	
ANDONIS MORFESIS,	:	
Respondent-Appellant.	:	

Respondent Andonis Morfesis appeals from an order of the Civil Court, New York County, entered November 24, 1986 which, after a hearing (Lewis Friedman, H.J.) adjudged respondent in civil and criminal contempt, and sentenced respondent to a definite jail sentence of 30 days.

PER CURIAM:

Order entered November 24, 1986 (Lewis Friedman, H.J.) affirmed, with $10 costs (see Department of Housing Preservation and Development v. 24 West 132 Equities, Inc., NYLJ, December 11, 1987, p. 12).

I concur /s/

I concur /s/

I concur /s/

[Opinion of Housing Court, Dated August 6, 1986]

CIVIL COURT OF THE CITY OF NEW YORK COUNTY OF NEW YORK: PART 18-L

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

TONY MORFESIS, et al.

Respondents.

HP 1531/86

OPINION

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LEWIS R. FRIEDMAN, Housing Judge

The petitioner, the Department of Housing Preservation and Development ("DHPD"), commenced five separate proceedings, under Articles 51 and 53 of the Housing Maintenance Code ("HMC") to obtain orders requiring the respondents to provide heat and hot water to specified multiple dwellings. The proceedings involved different premises in Manhattan which were allegedly owned or controlled by different combinations of the respondents. The buildings involved in these proceedings are:

369 West 126th Street	Index No. HP 1531/86
24 West 132nd Street	Index No. HP 1534/86
537 West 133rd Street	Index No. HP 1535/86
541 West 133rd Street	Index No. HP 1536/86
236-238 West 149th Street	Index No. HP 1544/86

In each case it was alleged that respondents were the "owners" of the property, as the term is defined in HMC §D26-1.07(45), and that violations had been placed at the premises for a lack of heat or hot water as required by Article 17 of the HMC. Each proceeding sought the imposition of civil penalties under §D26-51.01(k) and the issuance of a Mandatory injunction under §D26-53.01.

On the return of the order to show cause which commenced each of the individual proceedings, December 12, 1985, an attorney was in court on behalf of each of the respondents and requested an adjournment; she did not file a written notice of appearance. The cases were adjourned.

On December 17 counsel for respondents did not file an answer or a written appearance but requested a further adjournment for several weeks. The court, in conformity with the practice established in the Code Enforcement Part of the Housing Court for many years, refused to adjourn the matter unless an "interim order" to require heat and hot water pending the disposition of the case were entered. See §§D26-53.01, 53.05. Counsel refused to consent to the "interim order" but insisted on a January trial date. In light of the similarity of the parties the cases were consolidated. The adjournment requested by respondents' counsel was granted and a single order was signed in the consolidated case requiring compliance with Article 17 of the HMC pending the next court date, January 10. On that date a further adjournment was had.

On January 16, 1986 an attorney again appeared in court for respondents but left before the case was called. When no one appeared for respondents for trial an order

was signed on default. That default order imposed civil penalties and included an injunction which mandated the respondents to provide heat and hot water as required by Article 17 of the HMC.

The Instant Proceeding

By order to show cause signed April 15, 1986 the petitioner sought civil and criminal contempt sanctions for violations of the December 17 and January 16 orders. The application was based on a series of violations for inadequate heatr and hot water which had been issued at the various buildings involved in the case. Although a written response was never filed to the contempt proceeding, the matter proceeded to trial.

The petitioner's case at the trial relied on numerous violations which had been issued on the various buildings. The violations were placed during the period after the orders were signed through early May. They depicted a total disregard for the health and welfare of the tenants in the premises. The number and nature of the violations for inadequate heat and hot water are summarized below with some indication of the extreme temperatures recorded by the DHPD inspectors. Some of the violations were also for a lack of any hot water supply. The breakdown, by building, shows:

369 West 126th Street 7 Heat 7 Hot water

(lowest room temp 44; lowest hot water temp 38)

24 West 132nd Street 8 Heat 10 Hot water

(lowest room temp 50; lowest hot water temp 36)

537 West 133rd Street 15 Heat 21 Hot water

(lowest room temp 46; lowest hot water temp 36)

541 West 133rd Street 6 Heat 8 Hot water

(lowest room temp 48; lowest hot water temp 40)

236-238 West 149th Street 7 Heat 7 Hot water

(lowest room temp 40; lowest hot water temp 32)

The petitioner further called a series of tenants who lived in the various buildings. The witnesses, each all of whom the court found to be credible, testified in substance that there was very little heat during the entire heating season. In one building there was heat for only 17 days during the period after the December order was signed.

The petitioner further called an inspector who had worked in the plumbing and heating field for 12 years. He testified as to the conditions which he observed at each of the five buildings. Even in May the boilers were in deplorable condition and some were not functioning.

At the end of the petitioner's case it was dismissed as to all respondents except for Andonis Morfesis (also known as "Tony") since the petitioner could not produce affidavits of service of the order to show cause which commenced the contempt proceeding. The respondent called one witness to describe the conditions of the heating plant at 2 of the buildings and the difficulties with vandalism. The witness testified that he ceased to do business with Mr. Morfesis in January 1986 because there was a new managing agent for the properties and the new agent used a different oil company. The witness

acknowledged that Mr. Morfesis had used several other suppliers for his many buildings and he did not know if he still owned or controlled these. No other witness testified for respondents.

The respondent Morfesis's position was that the petitioner had not properly served the papers in the underlying proceeding, had not properly served the orders which were the basis of the contempt proceeding, had not properly served the order to show cause which commenced the contempt proceeding, and had not established that Mr. Morfesis was an "owner" of the properties, under HMC §D26-1.07 (45) at the time of the 1986 violations.

Respondent's arguments

Respondent challenges the court's jurisdiction to enter the orders in the underlying proceeding. The January 16 orders were signed on default. Respondent never moved to set them aside. Accordingly it is too late at this juncture to argue the merits of the underlying proceedings.

In any event there is nothing in the record before the court to show that the underlying proceedings were not validly commenced. Respondent has not offered any proof to show the invalidity of the service of the original orders to show cause. The affidavits of service are clearly sufficient on their face to establish the court's jurisdiction to determine the merits of the injunction and penalty cases. Each affidavit of service shows substituted or "mail and nail" service at the address registered by the respondent with DHPD as required by HMC Article 41. As this court has previously held, New York City Civil Court Act

§110 (m) is a valid exercise of the State's power to insure that parties receive proper notice of proceedings. "In short, respondent, who registered the addresses, should not now be permitted to deny that the address served is the proper place." *Department of Housing Preservation & Development v. Arick*, 133 Misc 2d ___ (Civ. Ct. NY Co 1986), Index No HP 77/85.

It may well be that respondent's counsel's appearance to request adjournments was the equivalent of a formal appearance sufficient to confer jurisdiction in the absence of an objection. See CPLR 320 (b). The law is well settled that the time to raise a lack of personal service objection is before an order is violated, not after. *County of Orange v. Civil Service Employees Assoc., Inc*, 51 AD 2d 1031 (2nd Dept 1976); CF. *United States v. United Mine Workers*, 330 U.S. 258. Respondent cannot litigate the validity of service of the underlying proceeding during this contempt proceeding.

Clearly, if the original proceeding was properly commenced, which respondent cannot now challenge, the service of the certified copies of the December and January orders was proper. See CPLR 5104. Respondent was also aware through counsel that the December order was signed since counsel was standing at the bench when the court granted her application to adjourn and signed the order.

Respondent also attacks the service of the order to show cause which commenced the contempt proceeding. Although no formal answer was served, the holding in *Lu v. Betancourt*, 116 AD 2d 492 (1st Dept 1986), probably permits it to be raised even though not pleaded. Compare

CPLR 3211 (a). The primary objection to jurisdiction is that service was not "personal". This court has dealt with that claim at length in *Department of Housing Preservation & Development v. Arick, supra,* has noted the distinction between "personal service" and "personal delivery" and will not repeat that analysis here. The cases cited by respondent do not require a different result from that in *Arick*. Suffice it to say that there was valid "personal service" on respondent here. The mailing to the address set forth in the registration statements filed by respondent is sufficient under NYCCCA §110 (m) and CPLR 308 (2), (4). Respondent may, as his counsel has argued, have a residence that differs from the one that he registered. The failure to serve at such a new residence is respondent's fault, not petitioner's. Similarly it is of no moment that respondent's former home and business addresses were the same and are not allegedly different. In any event, if the correct current addresses differ from those registered by respondent, there is no proof of them in the record.

Respondent argues that there was no proof that he was an "owner" of the properties at the times in question. He misperceives the issues in the contempt proceeding. The existence of the underlying order established sufficient basis for the proceeding to hold respondent in contempt for a violation simply upon proof of noncompliance. Additionaly there was proof before the court in the registration statements sufficient to justify the entry of the injunctions. There is nothing credible before the court to lead to a conclusion that the conditions have changed. The "new" registrations did not change the fact that the tenants did not ever see or learn of the alleged

new managing agents. Simply put, on this record there is ample basis to conclude that the respondent, Mr. Morfesis, had the ability to comply with the court order, which, of course, is the only relevant inquiry at this time.

There is no doubt whatever that the acts of the respondent Andonis Morfesis were in violation of the court's orders. There is no doubt whatever that the respondent's acts in failing to provide heat or hot water were willful. The extreme temperatures in the buildings over an extended period of time and the total absence of hot water can only be construed as a disregard for the life and health of the numerous tenants in the buildings at issue here. The problems are not attributable to vandalism or to accidental breakdowns as gratuitously suggested by respondent's counsel without evidentiary support.

There is no doubt whatever that the acts of the respondent were calculated to and actually did impair, defeat, impede and prejudice the rights of the petitioner in this proceeding. There is no doubt what ever that the respondent Andonis "Tony" Morfesis is guilty of civil and criminal contempt of this court's orders.

Conclusion

As the above demonstrates there is a more than adequate basis for the imposition of both civil and criminal contempt sanctions.

The judgment to be signed in this proceeding will impose a civil contempt penalty fine of $250. Judic. L. §773; see *S. I. Holding Corp. v. Harris*, NYLJ Feb. 14, 1986,

p. 13, col. 1 (App. T. 1st Dept); *State of New York v. Unique Ideas, Inc.*, 44 NY 2d 345, 349-50 (1978). Despite the request by the petitioner, the proof does not support the imposition of an indefinite coercive jail sentence.

For the counts of criminal contempt the court will impose an appropriate fine. The fine will be set not in excess of $250 for each day that there was an absence of heat or hot water as required by the underlying order.

In light of the absolutely deplorable conditions described in the record of this case, a criminal contempt jail sentence is reasonable and will be imposed. The length of the sentence will be determined at a sentencing hearing when the respondent is personally present before the court.

Sentence is set before me for August 13, 1986 at 2 P.M. in Part 18-L, Room 526. If the respondent is not personally present for sentence at that time, an arrest warrant will be issued.

Dated: August 6, 1986

/s/
Lewis R. Friedman
Housing Judge

[Opinion of Housing Court,
Dated August 6, 1986]

CIVIL COURT OF THE CITY OF
NEW YORK COUNTY OF
NEW YORK: PART 18-L

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against- HP 519/86

ANDONIS MORFESIS and 182 East 122nd Street Equities, Inc OPINION

Respondents.

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LEWIS R. FRIEDMAN, Housing Judge

The petitioner, the Department of Housing Preservation and Development ("DHPD"), commenced a proceeding under Articles 51 and 53 of the Housing Maintenance Code ("HMC") to obtain an order requiring the respondents to provide heat and hot water to 182 East 122nd Street (the "premises"). The premises were allegedly owned or controlled by the respondents.

It was alleged that respondents were "owners" of the property, as the term is defined in HMC §D26-1.07(45), and that violations had been placed at the premises for a lack of heat or hot water as required by Article 17 of the HMC. The proceeding sought the imposition of civil penalties under §D26-51.01(k) and the issuance of a mandatory injunction under §D26-53.01.

On the return of the order to show cause which commenced the proceeding, March 6, 1986, no one

appeared on behalf of the respondents. A order was signed on default. That default order imposed civil penalties and included an injunction which mandated the respondents to provide heat and hot water as required by Article 17 of the HMC. The order was served on respondents on March 14.

The Instant Proceeding

By order to show cause signed June 13, 1986 the petitioner commenced a proceeding for civil and criminal contempt sanctions for violations of the March 6 order. The application was based on a series of violations for inadequate heat and hot water which had been issued at the premises. Respondents' written answer challenged service of the papers, interposed a general denial and alleged the defenses available in a civil penalties proceeding. see HMC §D26-51.01 (k).

The petitioner's case at the trial relied on several violations which had been issued at the premises for a lack of heat and hot water for the period after the March 6 order had been served. The April 10 violations showed an inside temperature of 60° with the "hot water" at 50°; the April 21 violation was for "hot water" of 42°, heat was not required on that day.

The petitioner further called a series of tenants who lived in the various buildings. The witnesses, each of whom the court found to be credible, testified in substance that there was very little heat during the entire heating season. They maintained that there was no heat or hot water at all until the hot water was restored at the end of June.

The respondents called the current managing agent for the premises to describe the conditions of the heating plant at the premises. The witness testified that various repairs were done to the heating plant until the conditions were so bad that a new hot water heater was installed at the end of June. The agent offered evidence that bills had been submitted to him from repair companies which worked on the heating plant during the winter. Those bills, even if properly admissible, added nothing to the defense. The sere for repairs done January 30, February 18 and March 4; all dates prior to the underlying order here. No other evidence was offered by respondents.

Respondent's arguments

Respondents' primary defense at trial was that the tenants were not telling the truth. The court has observed the demeanor of the witnesses and concludes that they were telling the truth when they testified to the deplorable conditions of a lack of heat and hot water this past heating season. The proof offered by respondents establishes further that there was inadequate heat and hot water this winter.

Respondents challenged the service of the order to show cause which commenced the contempt proceeding. The papers were served at the address of the respondent Morfesis which was registered with the petitioner pursuant to HMC Article 41. As this court has previously held, New York City Civil Court Act §110 (m) is a valid exercise of the State's power to insure that parties receive proper notice of proceedings. "In short, respondent, who

registered the addresses, should not now be permitted to deny that the address served is the proper place." *Department of Housing Preservation & Development v. Arick*, 133 Misc 2d ___ (Civ. Ct NY Co 1986), Index No HP 77/85. Although unnecessary, petitioner also served the papers at another "business address" believed to be used on occasion by Mr. Morfesis.

The primary objection to jurisdiction is that service was not "personal". This court has dealt with that claim at length in *Department of Housing Preservation & Development v. Arick, supra*, has noted the distinction between "personal service" and "personal delivery" and will not repeat that analysis here. Suffice it to say that there was valid "personal service" on respondent here. The mailing to the address set forth in the registration statements filed by respondent is sufficient under NYCCCA §110 (m) and (PLR 308 (2), (4). In any event, if the correct current addresses differ from those registered by respondent, there is no proof of them in the record.

There is no doubt whatever that the acts of the respondent Andonis Morfesis were in violation of the court's order. There is no doubt whatever that the respondent's acts in failing to provide heat or hot water were willful. The extreme temperatures in the buildings over an extended period of time and the concede lack of hot water can only be construed as a blatant disregard for the life and health of the tenants in the building here.

There is no doubt whatever that the acts of the respondent were calculated to and actually did impair, defeat, impede and prejudice the rights of the petitioner in this proceeding. There is no doubt what ever that the

respondent Andonis "Tony" Morfesis is guilty of civil and criminal contempt of this court's orders.

Conclusion

As the above demonstrates there is a more than adequate basis for the imposition of both civil and criminal contempt sanctions.

The judgment to be signed in this proceeding will impose a civil contempt penalty fine of $250. Judic. L. §773; see *S. I. Holding Corp. v. Harris*, NYLJ Feb. 14, 1986, p. 13, col. 1 (App. T. 1st Dept); *State of New York v. Unique Ideas, Inc.*, 44 NY 2d 345, 349-50 (1978). Despite the request by the petitioner, the proof does not support the imposition of an indefinite coercive jail sentence.

For the counts of criminal contempt the court will impose an appropriate fine. The fine will be set not in excess of $250 for each day that there was an absence of heat or hot water as required by the underlying order.

In light of the absolutely deplorable conditions described in the record of this case, a criminal contempt jail sentence is reasonable and will be imposed. The length of the sentence will be determined at a sentencing hearing when the respondent is personally present before the court.

Sentence is set before me for August 13, 1986 at 2 P.M. in Part 18-L, Room 526. If the respondent is not personally present for sentence at that time, an arrest warrant will be issued.

Dated: August 6, 1986

/s/ Lewis R. Friedman
Lewis R. Friedman
Housing Judge

[Opinion of Housing Court,
Dated August 11, 1986]

CIVIL COURT OF THE CITY OF
NEW YORK COUNTY OF
NEW YORK: PART 18-L

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against- HP 1625/86

ANDONIS MORFESIS and EDGECOMBE EQUITIES, INC. OPINION

Respondents.

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LEWIS R. FRIEDMAN, Housing Judge

The petitioner, the Department of Housing Preservation and Development ("DHPD"), commenced a proceeding under Articles 51 and 53 of the Housing Maintenance Code ("HMC") to obtain an order requiring the respondents to provide heat and hot water to 323 Edgecombe Avenue (the "premises"). The premises were allegedly owned or controlled by the respondents.

It was alleged that respondents were "owners" of the property, as the term is defined in HMC §D26-1.07(45), and that violations had been placed at the premises for a lack of heat or hot water as required by Article 17 of the HMC. The proceeding sought the imposition of civil penalties under §D26-51.01(k) and the issuance of a mandatory injunction under §D26-53.01.

On the return of the order to show cause which commenced the proceeding, January 9, 1986, counsel

appeared on behalf of the respondents and signed an "interim order". That order included an injunction which mandated the respondents to provide heat and hot water as required by Article 17 of the HMC. Although the order was consented to by counsel, a certified copy of the order was served on respondents on January 15, 1986. See CPLR 5104.

The proceeding was adjourned to January 14 for the purpose of conducting a hearing on the amount of civil penalty which was due to DHPD. The respondents stipulated that the tenants if called would testify that (a) in apartment 15 there was violations of the heat and hot water provisions for every day from November 26, 1985 and (b) in apartment 9 and 5 there was no water at all for two-and-one-half weeks, no heat at all for three weeks, intermittent heat for the remainder of the post-November 26 period, and poor water pressure.

On January 14 the matter was adjourned for two days. On January 16, no one appeared on behalf of the respondents. An order was signed on default. That default order imposed civil penalties of $25,500 and included a continuing injunction which mandated the respondents to provide heat and hot water as required by HMC Article 17.

The Instant Proceeding

By order to show cause signed April 15, 1986 the petitioner commenced a proceeding for civil and criminal contempt sanctions for violations of the January 9 order. The application was based on two violations for inadequate heat and hot water which had been issued at the

premises subsequent to January 9. Respondents filed no written answer but challenged the petitioner's claims.

The petitioner's case at the trial relied on the violations issued at the premises for a lack of heat and hot water for the period after the January 9 order had been served. The January 25 violation showed an inside temperature of 60° with the hot water at 124°; the March 21 violation was for an inside temperature of 58° and "hot water" of 80°.

Petitioner called as its sole witness the inspector who conducted the March 21 inspection. The witness testified to the manner in which he conducted his investigation and the readings he took.

No evidence was offered by respondents.

Respondents' arguments

Respondents' primary defense at trial was that the inspector was not telling the truth. The respondent conducted a vigorous cross-examination of the inspector's methods and and his general credibility. The court observed the demeanor of the witness and has carefully evaluated his testimony. Despite the arguments proffered by respondent's counsel the court believes the witness and finds that he correctly measured the temperatures in question. There is no doubt that the witness was properly performing his duty and was accurately recalling it for the court.

There is no doubt whatever that the acts of the respondent Andonis Morfesis were in violation of the

court's order. There is no doubt whatever that the respondents' acts in failing to provide heat or hot water were willful. In this regard the court notes the conceded lack of heat and hot water which lead to the entry to the original order. The temperatures in the building over an extended period of time and the lack of hot water can only be construed as a blatant disregard for the life and health of the tenants in the building.

There is no doubt whatever that the acts of the respondent were calculated to and actually did impair, defeat, impede and prejudice the rights of the petitioner in this proceeding. There is no doubt what ever that the respondent Andonis Morfesis is guilty of civil and criminal contempt of this court's orders.

Conclusion

As the above demonstrates there is a more than adequate basis for the imposition of both civil and criminal contempt sanctions.

The judgment to be signed in this proceeding will impose a civil contempt penalty fine of $250. Judic. L. §773; see *S. I. Holding Corp. v. Harris*, NYLJ Feb. 14, 1986, p. 13, col. 1 (App. T. 1st Dept); *State of New York v. Unique Ideas, Inc.*, 44 NY 2d 345, 349-50 (1978). Despite the request by the petitioner, the proof does not support the imposition of an indefinite coercive jail sentence.

For the counts of criminal contempt the court will impose an appropriate fine. The fine will be set not in excess of $250 for each day that there was an absence of heat or hot water as required by the underlying order.

In light of the absolutely deplorable conditions described in the record of this case, a criminal contempt jail sentence is reasonable and will be imposed. The length of the sentence will be determined at a sentencing hearing when the respondent is personally present before the court.

Sentence is set before me for August 13, 1986 at 2 P.M. in Part 18-L, Room 526. If the respondent is not personally present for sentence at that time, an arrest warrant will be issued.

Dated: August 11, 1986

/s/

[ORDER SOUGHT TO BE REVIEWED]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 4, 1989.

Present – Hon. Theodore R. Kupferman, Justice Presiding
E. Leo Milonas
Bentley Kassal
Betty Weinberg Ellerin
Richard W. Wallach, Justices.

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Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 1

24 West 132 Equities, Inc.,

Respondent,

-and-

Andonis Morfesis,

Respondent-Appellant.

---x

Department of Housing Preservation and Development
of the City of New York,

Petitioner-Respondent,

-against- Action No. 2

Chance Equities, Inc. and Maria Morfesis, 36357-58-59

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

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Department of Housing Preservation and Development
of the City of New York,

Petitioner-Respondent,

-against- Action No. 3

232 West Associates and Joseph Colon,

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

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Appeals having been taken to this Court by the above-named appellant, from orders of the Appellate Term of the Supreme Court, First Department, entered on December 8, 1987, December 23, 1987, and January 7, 1988, respectively,

Appeal Nos. 36357-58-59

And said appeals having been argued by Herald Price Fahringer, of counsel for the respondent-appellant, and by Janessa C. Nisley, of counsel for the petitioner-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the orders so appealed from be and the same hereby are affirmed, without costs and without disbursements. (See Appeal No. 36380, decided simultaneously herewith.)

ENTER:

ALAN M. BERGER
DEPUTY Clerk.

[ORDER DENYING LEAVE TO APPEAL]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 24, 1989.

Present – Hon. Theodore R. Kufperman, Justice Presiding
E. Leo Milonas
Bentley Kassal
Betty Weinberg Ellerin
Richard W. Wallach, Justices.

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Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 1

24 West 132 Equities, Inc.,

Respondent,

-and-

Andonis Morfesis,

Respondent-Appellant.

M-5361

[3657-58-59]

Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 2

Chance Equitas, Inc. and Maria Morfesis,

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 3

232 West Associates and Joseph Colon,

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

----------x

Respondent-appellant in the above-entitled actions having moved this Court for leave to appeal to the Court of Appeals from an order of this Court entered on May 4, 1989,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is denied, with $100 costs.

ENTER:

FRANCIS X. GALDI
Clerk.

CIVIL PRACTICE LAW AND RULES

§ 308. Personal service upon a natural person

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. Where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business,

dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

(As amended L.1974, c. 765, § 2; L.1977, c. 344 § 1)

N.Y. CITY CIVIL COURT ACT

§ 110. Housing part

(a) A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York, as follows:

(1) Actions for the imposition and collection of civil penalties for the violation of such laws.

(2) Actions for the collection of costs, expenses and disbursements incurred by the city of New York in the elimination or correction of a nuisance or other violation of such laws, or in the removal or demolition of any dwelling pursuant to such laws.

(3) Actions and proceedings for the establishment, enforcement or foreclosure of liens upon real property and upon the rents therefrom for civil penalties, or for costs, expenses and disbursements incurred by the city of New York in the elimination or correction of a nuisance or other violation of such laws.

(4) Proceedings for the issuance of injunctions and restraining orders or other orders for the enforcement of housing standards under such laws.

(5) Actions and proceedings under article seven-A of the real property actions and proceedings law, and all summary proceedings to recover possession of residential premises to remove tenants therefrom, and to render judgment for rent due, including without limitation those

cases in which a tenant alleges a defense under section seven hundred fifty-five of the real property actions and proceedings law, relating to stay or proceedings or action for rent upon failure to make repairs, section three hundred two-a of the multiple dwelling law, relating to the abatement of rent in case of certain violations of section D26-41.21 of such housing maintenance code.

(6) Proceedings for the appointment of a receiver of rents, issues and profits of buildings in order to remove or remedy a nuisance or to make repairs required to be made under such laws.

(7) Actions and proceedings for the removal of housing violations recorded pursuant to such laws, or for the imposition of such violation or for the stay of any penalty thereunder.

(8) Special proceedings to vest title in the city of New York to abandoned multiple dwellings.

(9) The city department charged with enforcing the multiple dwelling law, housing maintenance code, and other state and local laws applicable to the enforcement of proper housing standards may commence any action or proceeding described in paragraphs one, two, three, four, six and seven of this subdivision by an order to show cause, returnable within five days, or within any other time period in the discretion of the court. Upon the signing of such order, the clerk of the housing part shall issue an index number.

(b) On the application of any city department, any party, or on its own motion, the housing part of the civil court shall, unless good cause is shown to the contrary,

consolidate all actions and proceedings pending in such part as to any building.

(c) Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest; provided in the event any such proposed remedy, program or procedure entails the expenditure of monies appropriated by the city, other than for the utilization and deployment of personnel and services incidental thereto, the court shall give notice of such proposed remedy, program or procedure to the city department charged with the enforcement of local laws relating to housing maintenance and shall not employ such proposed remedy, program or procedure, as the case may be, if such department shall advise the court in writing within the time fixed by the court, which shall not be less than fifteen days after such notice has been given, of the reasons such order should not be issued, which advice shall become part of the record. The court may retain continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed.

(d) In any of the actions or proceedings specified in subdivision (a) and on the application of any party, any city department or the court, on its own motion, may join any other person or city department as a party in order to effectuate proper housing maintenance standards and to promote the public interest.

(e) Actions and proceedings before the housing part shall be tried before civil court judges, acting civil court judges, or housing judges. Housing judges shall be appointed pursuant to subdivision (f) of this section and shall be duly constituted judicial officers, empowered to hear, determine and grant any relief within the powers of the housing part in any action or proceeding except those to be tried by jury. Such housing judges shall have the power of judges of the court to punish for contempts. Rules of evidence shall be applicable in actions and proceedings before the housing part. The determination of a housing judge shall be final and shall be entered and may be appealed in the same manner as a judgment of the court; provided that the assignment of actions and proceedings to housing judges, the conduct of the trial and the contents and filing of a housing judge's decision, and all matters incidental to the operation of the housing part, shall be in accordance with rules jointly promulgated by the first and second departments of the appellate division for such part.

(f) The housing judges shall be appointed by the administrative judge from a list of persons selected annually as qualified by training, interest, experience, judicial temperament and knowledge of federal, state and local housing laws and programs by the advisory council for the housing part. The annual salary of a housing judge shall be sixty-six thousand two hundred and fifty dollars.

(g) The advisory council for the housing part shall be composed of two members representative of each of the following: the real estate industry, tenants' organizations, civic groups and bar associations and four members from the public at large. Such members shall be

appointed by the administrative judge, with the approval of the presiding justices of the first and second departments of the appellate division. The members of the advisory council shall be appointed for renewable terms of three years provided that one of the initial members of each classification of membership shall serve for two years. In addition the mayor of the city of New York shall appoint one member to serve at his pleasure and the commissioner of housing and community renewal shall be a member.

(h) The advisory council shall meet at least four times a year, and on such additional occasions as they may require or as may be required by the administrative judge. Members shall receive no compensation. Members shall visit the housing part from time to time to review the manner in which the part is functioning, and make recommendations to the administrative judge and to the advisory council. A report on the work of the part shall be prepared annually and submitted to the administrative judge, the administrative board of the judicial conference, the majority and minority leaders of the senate and assembly, the governor, and the mayor of the city of New York by the thirty-first day of January of each year.

(i) Housing judges shall have been admitted to the bar of the state for at least five years, two years of which shall have been in active practice. Each housing judge shall serve full-time for five years. Reappointment shall be at the discretion of the administrative judge and on the basis of the performance, competency and results achieved during the preceding term.

[*(j) Repealed*]

(k) Unless a party requests a manual stenographic record by filing a notice with the clerk two working days prior to the date set for an appearance before the court, hearings shall be recorded mechanically. A party may request a transcript from a mechanical recording. Any party making a request for a copy of either a mechanically or manually recorded transcript shall bear the cost thereof and shall furnish a copy of the transcript to the court, and to the other parties.

(*l*) Any city department charged with enforcing any state or local law applicable to the enforcement of proper housing standards may be represented in the housing part by its department counsel in any action or proceeding in which it is a party. A corporation which is a party may be represented by an officer, director or a principal stockholder.

(m) The service of process in any of the actions or proceedings specified in subdivision (a) which are brought under the housing maintenance code of the administrative code of the city of New York shall be made as herein provided:

(1) Service of process shall be made in the manner prescribed for actions or proceedings in this court, except where the manner of such service is provided for in the housing maintenance code of the administrative code of the city of New York, such service may, as an alternative, be made as therein provided.

(2) Where the manner of service prescribed for actions or proceedings in this court includes delivery of the summons to a person at the actual place of business of the person to be served, such delivery may be made

alternatively to a person of suitable age and discretion at the address registered with the department charged with the enforcement of local laws relating to housing maintenance pursuant to article forty-one of such code, hereinafter referred to as the "registered address".

(3) Where the manner of service prescribed for actions or proceedings in this court includes affixing the summons to the door of the actual place of business of the person to be served, the summons may, as an alternative, be posted in a conspicuous place on either the premises specified in the summons or the registered address.

(4) Where the manner of service for actions or proceedings in this court includes mailing the summons to the person to be served at his last known residence, the summons may, as an alternative, be mailed to the registered address; however, if the person to be served has not registered as required by article forty-one of such housing maintenance code, such summons may, as an alternative, be mailed to an address registered in the last registration statement filed with such department other than the address of the managing agent of the premises and to the last known address of the person to be served.

(5) Where the manner of service for actions or proceedings in this court includes mailing the summons to the person to be served at his last known residence, if the person to be served is a corporation and if either: (i) an officer of such corporation, (ii) the managing agent of such corporation for the premises involved in the suit or (iii) a person designated by such corporation to receive notices in its behalf, other than the secretary of state, has been named a party to the suit, the summons may, as an

alternative, be mailed to the registered address of such corporation or, if such corporation has not registered as required by such code, to the address of such corporation set forth in a document filed or recorded with a governmental agency.

(6) A copy of the summons with proof of service shall be filed in the manner provided in section four hundred nine, except that such filing shall be made with the clerk of the housing part in the county in which the action is brought.

(n) Nothing contained in the section one hundred ten shall in any way affect the right of any party to trial by jury as heretofore provided by law.

(*o*) There shall be a sufficient number of pro se clerks of the housing part to assist persons without counsel. Such assistance shall include, but need not be limited to providing information concerning court procedure, helping to file court papers, and, where appropriate, advising persons to seek administrative relief.

(Added L.1972, c. 982, § 2; amended L.1973, c. 701, §§ 1-4; L.1973, c. 704, § 1; L.1974, c. 958, § 5; L.1977, c. 849, §§ 1-7; L.1978, c. 309, § 1; L.1978, c. 310, §§ 1-3; L.1978, c. 664, § 4; L.1980, c. 524, § 1; L.1982, c. 665, § 1; L.1984, c. 528, § 1; L.1984, c. 986, § 14)

[EXCERPT FROM PETITIONER'S BRIEF
IN APPELLATE TERM]

"indispensible" least the alleged contemnor be convicted without a full and fair opportunity to be heard prior to the imposition of sentence.

Abandonment of a personal delivery requirement in criminal contempt proceedings would therefore collide with basic due process requirements. The best means of notification must always be utilized in criminal proceedings, e.g. *People v. Turkel*, NYLJ Nov. 1, 1985, p. 13 col. 1 *supra*); trials in abstentia which perforce results from less than the best means of service, have always been deemed obnoxious to the overriding concerns of fundamental fairness (*People v. Smith*, 68 NY2d 725; *People v. Parker*, 57 NY2d 136). A criminal defendant must be warned, on the record, of the consequences of a failure to appear; otherwise, a failure to appear does not warrant the conduct of a trial in defendant's absence. (*People v. Smith, supra*).

Because, as consistently observed above, the full panoply of criminal procedures apply to criminal contempt proceedings, then there is simply no reason why that approach should be jettisoned here. The approach utilized by the Housing Judge here clearly fails to comport with required principles of law. Consequently, there has been a serious infringement upon appellant's due process rights which requires that the criminal convictions be set aside.

[EXCERPT FROM PETITIONER'S BRIEF IN APPELLATE DIVISION]

POINT I

TO PUNISH APPELLANT FOR CRIMINAL CONTEMPT, PERSONAL DELIVERY OF PROCESS TO HIM WAS REQUIRED, BOTH TO OBTAIN JURISDICTION AND TO COMPLY WITH DUE PROCESS.

Introduction

Under New York law, a proceeding to punish for criminal contempt must be commenced by personal, in-hand delivery of process to the alleged contemnor. Such service is also required by the due process clauses of the state and federal constitutions. Even if personal, in-hand service were not required in every criminal contempt proceeding, it was required here, since appellant was sentenced to at least seven consecutive 30-day jail terms.

Failure To Personally Serve The Alleged Contemnor Constitutes A Jurisdictional Defect

In *Lu v. Betancourt*, 116 A.D.2d 492, 496 N.Y.S.2d 754 (1st Dept. 1986), this Court vacated a petitioner's criminal contempt conviction because personal service on petitioner had never been effectuated and, therefore, no criminal contempt proceeding was properly commenced against her. 496 N.Y.S.2d at 756. The Court made clear that "[w]here the penalty of criminal contempt is sought, failure to *personally serve* the alleged contemnor constitutes a jurisdictional de-

(2)

No. 89-1020

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ANDONIS MORFESIS,

Petitioner,

v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

VICTOR A. KOVNER,
Corporation Counsel of
the City of New York,
Attorney for Respondent,
100 Church Street
New York, New York 10007
(212) 566-4338

LEONARD J. KOERNER,*
FAY LEOUSSIS,
JANESSA C. NISLEY
JERALD HOROWITZ,
of Counsel.

*Counsel of Record

January 25, 1990

COUNTER QUESTIONS PRESENTED

1. Whether notice of a criminal contempt proceeding served by leaving a copy of and mailing one to an address petitioner was required by statute to register with a governmental agency contravenes the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Whether the jail sentences imposed from seven separate criminal contempt proceedings may be aggregated to provide petitioner criminal due process protections that would not otherwise be available?

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COUNTER-STATEMENT OF FACTS

The petitioner, Andonis Morfesis, is the owner of residential multiple dwellings in New York City. In the winter of 1985-1986 he failed to provide heat and hot water to the tenants in seven buildings as required by the New York City Administrative Code,

which sets forth various standards, including minimum temperatures that must be provided ("NYC Admin. Code") §§27-2029, 27-2031. Based on violations recorded by its inspectors, the Department of Housing Preservation and Development of the City of New York ("HPD") commenced seven separate code enforcement proceedings in the New York City Civil Court, New York County, which resulted in orders directing petitioner to comply with statutory standards for the provision of heat and hot water and, ultimately, in the seven separate contempt orders that petitioner seeks to have this Court review. Each of the contempt orders imposed a thirty-day jail sentence for criminal contempt and expressly states that the sentence may be reduced once the petitioner appears or is brought before the Court (Respondent's Appendix ["Resp.

App."] at A4, A10, A16, A22, A28-29, A35, A40-A41).

The contempt proceedings were based on interim and final orders in the underlying code enforcement proceedings directing petitioner to provide heat and hot water as required by statute. Those orders were duly served on the petitioner at the address that he was required by the statute to register with HPD and update within five days should there be a change of address ("registered address") See N.Y.C. Admin. Code §§27-2097, 27-2098, 27-2099, 27-2100. (Resp. App. at A48-A54)

When violations continued to be recorded on later HPD inspections of tenants' apartments in the seven buildings,[1] HPD

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[1]When the statutory minimum for heat was an indoor temperature of 68°F. and 120°F. for hot water, indoor temperature readings as (Footnote Continued)

commenced proceedings for civil and criminal contempt under the New York Judiciary Law ("Jud. Law") by order to show cause. See Jud. Law, §750 et seq. Each show cause order gave notice of the time and place of the hearing and of the criminal and civil contempt charges, demanded petitioner's attendance and, as required by the Judiciary Law §751, warned of the possible imposition of fines or imprisonment. The supporting affirmation gave notice of the nature of the disobedience and the essential facts underlying it.

(Footnote Continued)
low as 44°F., 50°F., 46°F., 48°F., 40°F. and 58°F. were recorded in each of six of the seven buildings. No heat was required in the seventh building at that time, because the outdoor temperature was above 55°F. Hot water temperatures as low as 38°F., 36°F., 40°F., and 32°F. were recorded in the buildings. Multiple violations were placed on each building with one building having as many as fifteen heat and twenty-one hot water violations.

The show cause orders directed that service be made in accordance with the New York Civil Practice Law and Rules ("CPLR") and the New York City Civil Court Act ("NYCCCA"). As permitted by CPLR §308 and NYCCCA §110(m), the orders to show cause and affirmations were served by delivering copies to a "person of suitable age and discretion" at the address petitioner registered with HPD, which was petitioner's business office, and mailing a copy to petitioner at that same address, which petitioner stated in his HPD Registration was also his residential address. CPLR §308(2) does not require that a diligent effort be made to serve a person in-hand before utilizing this method of service. See CPLR §308(2); NYCCCA §110(m) (Petitioner's Appendix ["Pet. App."] 35-44).

Petitioner and the other respondents in the contempt proceedings appeared by

attorney on the return date. Under CPLR §3211(e), petitioner waived objections to personal jurisdiction in six of these proceedings based on his failure timely to assert them by answer or motion. At the commencement of the contempt hearing, the trial court granted an application by petitioner's attorney for separate contempt orders in the five underlying enforcement proceedings that had been previously consolidated on HPD's motion. The other two proceedings were heard separately.

Petitioner chose not to attend the contempt hearings and did not testify on his own behalf at any of the hearings. In six of the proceedings, lack of personal jurisdiction was not raised until after HPD had put in its case. In two decisions dated August 6, 1986 and another dated August 11, 1986, the trial judge found petitioner in civil and criminal contempt for his wilful

disobedience of its injunctive orders and set a single sentencing hearing for these proceedings for August 13, 1986 at 2:00 p.m. Each decision expressly stated that an arrest warrant would be issued if the petitioner was not personally present for sentencing (See Pet. App. 10-18).

Petitioner did not appear at the sentencing hearing. Instead, three attorneys appeared on his behalf. After hearing argument, the trial court adjourned the matter sine die subject to the petitioner's appearance before the court either voluntarily or subject to an arrest warrant. The court subsequently signed the seven arrest orders in which he sentenced petitioner to 30 days in jail in each, to run consecutively, but specifically stated that the sentences could be reduced upon petitioner's appearance in Court (Resp. App.

at A4, A10, A16, A22, A28-A29, A35, A40-A41).

On appeal to the New York Supreme Court, Appellate Term, First Department, based on this Court's decisions in Cooke v. United States, 267 U.S. 517 (1925) and Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), the Appellate Term rejected petitioner's constitutional argument and unanimously affirmed the Civil Court. The Appellate Term found that jurisdiction over petitioner's person was obtained in conformity with the United States Constitution and New York law. (Pet. App. 1-5). On appeal, by leave of the Appellate Term, First Department, to the New York Supreme Court, Appellate Division, First Department, the Appellate Division affirmed without opinion (Pet. App. 6-9, 30-32).

Petitioner then appealed as of right on constitutional grounds to the Court of

Appeals. After the submission of letter briefs by the parties, that appeal was dismissed sua sponte by the Court of Appeals upon the ground that the order appealed from did not finally determine the proceedings (Resp. App. A43-A44). Petitioner then moved in the Appellate Division for leave to appeal to the Court of Appeals, which was denied (Pet App. 33-34).

Stays pending the appeals of the seven arrest orders were granted by the Appellate Term and have continued through the state appellate process. On November 1, 1989, the Appellate Division granted a stay pending filing and disposition of a petition for certiorari to this Court.

OPINIONS BELOW

(1)

The New York City Civil Court Opinions

In three opinions, two dated August 6, 1986 and a third dated August 11, 1986, the Civil Court found the petitioner in civil and criminal contempt based on his non-compliance with its orders. The Civil Court held that NYCCCA §110(m) is a valid exercise of the State's power to ensure that parties receive proper notice of proceedings, that mailing to the address the petitioner had filed with HPD was sufficient under NYCCCA §110(m) and CPLR 308(2) and (4), and that there had been valid personal service on the petitioner. In so holding, the Court observed that if petitioner had a residence at a different address from that he had registered with HPD, failure to serve at that address was the petitioner's fault and not that of HPD (Pet. App. 15-16, 21-22).

In the opinion dated August 6, 1986 relating to the five proceedings which had a consolidated contempt hearing, the Civil Court found that there was "no doubt whatever" that the petitioner's acts in failing to provide heat and hot water were willful and in violation of the court's order (Pet. App. 17). The court credited the tenants' testimony, which was in substance that they had very little heat throughout the heating season, and that of HPD's inspector, who had observed the boilers, all of which were in "deplorable" condition and some of which were not functioning. The Civil Court concluded, "The extreme temperatures of the buildings over an extended period of time and the total absence of hot water can only be construed as a disregard for the life and health of the numerous tenants in the buildings at issue here" (Pet. App. 13, 17). Based on the "absolutely deplorable

conditions" in the record, the court determined that a criminal contempt jail sentence should be imposed (Pet. App. 18).

In its opinions, dated August 6, 1986 and August 11, 1986, the Civil Court found that the petitioner had willfully violated the court's order in the sixth and seventh proceedings based on evidence of extremely low heat and hot water temperatures. In these cases, petitioner had conceded the lack of adequate heat and hot water, which the court construed as "blatant" disregard for the tenants' life and health, the Court found that a criminal contempt sentence should be imposed.

In each opinion, the Civil Court set a sentencing hearing for August 13, 1986. The court stated that at that time when the petitioner was personally before the court it would determine the length of the jail

sentences and that an arrest warrant would be issued should he not appear in person.

Since petitioner did not personally appear at the sentencing hearing, the court issued seven arrest warrants in which he sentenced petitioner to 30 days in jail in each of the seven proceedings to run consecutively, but expressly stated that the sentences may be reduced upon petitioner's appearance in court.

(2)

The New York State Supreme Court Appellate Term Opinion

The Appellate Term of the Supreme Court unanimously affirmed the orders and warrants of arrest of the Civil Court in an opinion reported sub. nom. Department of Housing Preservation and Development of the City of New York, 24 West 132 Equities, Inc., at 137 Misc.2d 459, 524 N.Y.S.2d 324 and in two opinions which relied on it. After reviewing the record, the Appellate

Term was satisfied that HPD had established petitioner's guilt of willful and deliberate disobedience of the court's underlying mandates beyond a reasonable doubt (Pet. App. 2).

The Appellate Term held that jurisdiction over the petitioner's person had been lawfully obtained where service was effected under the "leave and mail" provision of the CPLR. The Appellate Term rejected petitioner's argument that personal delivery of the contempt papers was required, reasoning that a criminal contempt proceeding is a civil special proceeding under New York law and is governed by civil rather than criminal procedure (Pet. App. 3-4). In support of its conclusion that personal service, as a jurisdictional predicate for criminal contempt, does not require personal delivery, the Appellate Term noted that there is no appellate case expressly

holding that personal delivery is required or that statutory alternatives are infirm.

The Appellate Term stated, "Personal delivery of process, as a heightened form of notice is of course always preferable, but due process does not require it in special proceedings such as this one so long as the party charged is notified of the accusation and is afforded a reasonable time to defend," citing Judiciary Law §751(1) and Cooke v. United States, 267 U.S. 517, 537 (1925). The court went on to observe (Pet-App. at 5):

> In the particular context of contempts not committed in the immediate presence of the court, it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders.

REASONS FOR DENYING THE WRIT

PETITIONER WAS GIVEN REASONABLE NOTICE OF THE CHARGES OF CRIMINAL CONTEMPT AND AN OPPORTUNITY TO DEFEND AS REQUIRED BY DUE PROCESS. PETITIONER RECEIVED ACTUAL NOTICE OF THE CHARGES, APPEARED BY ATTORNEY AND PUT IN A DEFENSE.

In support of his application for review, petitioner maintains that service pursuant to state statutes permitting notice of a criminal contempt proceeding to be left at and mailed to an address that petitioner was required to register by statute contravened his rights under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and that the decisions of the New York State courts that service was not constitutionally defective are not in accordance with recent decisions of this Court. To the contrary, the decision of the New York Supreme

Court, Appellate Term, affirmed by the Appellate Division, is consistent with the applicable determinations of this Court and petitioner has demonstrated no special or important reasons to justify further review on writ of certiorari.

The procedural due process standard required by the Constitution for notice in a non-summary criminal contempt proceeding was articulated by this Court in 1925 in Cooke v. United States, 267 U.S. 517, 537 (1925), and was recently reaffirmed. Young v. U.S. ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 798-99 (1987). It requires that the "accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation," which includes the assistance of counsel and the right to call witnesses. Cooke, 267 U.S. at 537.

This Court has made clear that procedural safeguards for criminal contempts are based on the Due Process Clause and are not derived from the explicit requirements of the Sixth Amendment. Levine v. United States, 362 U.S. 610, 616, reh'g denied, 363 U.S. 858 (1960). The determination of what is required may turn on the circumstances of a particular case. Id. "The provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness." Taylor v. Hayes, 418 U.S. 488, 500 (1974).

This Court has consistently refrained from prescribing the procedure required by due process in criminal contempt proceedings. In addressing the issue, this Court stated, "the exact form of the procedure in the prosecution of such contempts is not important." Cooke, supra, 267 U.S. at 536. In a more recent

discussion in Taylor v. Hayes, supra, 418 U.S. at 500, where an alleged contemnor faced deprivation of liberty, the Court described the due process requirement as "some orderly process, however informal," citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

Because the contempt power is basic to the administration of a State's judicial system, the State's interest in the contempt process through which it vindicates the operation of that system is of great importance. Juidice v. Vail, 430 U.S. 327, 335 (1977) (citing Ketcham v. Edwards, 153 N.Y. 534, 539, 47 N.E. 918, 920 (1897)). Due process is satisfied if the notice employed provides "the fundamental requisite of due process of law [which] is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). This Court has noted that it is not its

responsibility "to prescribe the form of service" that a state should adopt. Greene v. Lindsey, 456 U.S. 444, 445 n. 9 (1982).

It is for the State through its legislature and the court system to determine the procedure applicable to criminal contempt proceedings, including notice of the proceeding, as long as it affords the contemnor adequate notice of the charge and an opportunity to be heard. In Hicks on behalf of Feiock v. Feiock, 485 US 624, 108 S. Ct. 1423 (1988), where this Court addressed the question of classifying contempts as civil or criminal for the purpose of determining whether the due process protections required for criminal proceedings were applicable, this Court appears to have approved of giving notice by mail to the contemnor. This Court described the notice in Hicks, labeled "criminal in nature", as having been "sent to

respondent" and, in a footnote, the Court appears to say that that procedure was sufficient to satisfy due process. Id. at 1433; 1433 n.10.[2] Accordingly, and contrary to the petitioner's assertion (Pet. at 10), this Court's opinion in Hicks, does not support petitioner's conclusion that leave and mail service where the mailing is made to an address registered with HPD violates constitutional due process standards for notice.

Thus, in Hicks, this Court plainly did not expand the constitutional notice requirements applicable to criminal contempt proceedings, as petitioner would have this Court believe (Pet. at 8-10). The Hicks

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[2]In criminal contempt proceedings brought in the Federal Courts, personal delivery of notice is not required. See In re Sasson Jeans, Inc., 83 Bankr. 206, 217-18 (S.D.N.Y. 1988), remanded 86 Bankr. 336 (S.D.N.Y. 1988).

opinion states in a footnote, "one charged with a crime is 'not only entitled to be informed of the nature of the charge against him but to know that it is a charge and not a suit'." 108 S. Ct. at 1433, n. 10 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 446 (1911)). This Court was only underscoring the Gompers Court's concern that an alleged contemnor should not be left in doubt as to whether the object of the contempt proceeding is relief or punishment. Gompers, supra, 221 U.S. at 446.

The criminal contempt proceedings now before this Court were brought pursuant to the New York Judiciary Law, which governs applications to the courts for a finding of contempt in the course of existing proceedings. Section 751, which applies to criminal contempt, provides in language similar to the constitutional standard, where a contempt is not committed in the presence

of the court, "the party charged must be notified of the accusation and have a reasonable time to make a defense." N.Y. Jud. Law §751(1)(reprinted in Resp. App. at A45). See Sassower v. Sheriff of Westchester County, 824 F.2d 184 (2d Cir. 1987). (upholding constitutionality of section 751 of the Judiciary Law on its face). As required by Section 756 of the Judiciary Law, each of these criminal contempt proceedings was commenced by motion, contained notice of the charges and a warning in 8 pt. type that failure to appear could result in imprisonment. These motions, which warned of the seriousness of the charges and the consequences of not appearing, satisfy the Gompers standard that the party served know that the proceeding is a charge which may result in punishment and not a suit.

The motions were served pursuant to the leave and mail provisions of CPLR §308 and NYCCCA §110(m) (see Pet. App. 35-44)[3]. The motions were not left at the buildings, but delivered to the address that petitioner himself was required to list with HPD pursuant to section 27-2097 of the New York City Administrative Code, the purpose of which is to ensure that owners of residential dwellings may be actually and immediately contacted by HPD to resolve building violations.

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[3]The New York Legislature has since expanded the means by which personal jurisdiction may be acquired to include leaving at and mailing to the actual place of business by amending CPLR §308(2), 1988 N.Y. Laws ch. 125, 1987 N.Y. Laws ch. 115, 1986 N.Y. Laws ch. 77, and by adding a new section CPLR §312-a modeled on Rule 4 of the Federal Rules of Civil Procedure that provides for service by mail. 1989 N.Y. Laws ch. 274.

The legislative goal of the registration requirement in the context of housing code enforcement serves the legitimate state interest of ensuring that an owner of residential multiple dwellings is "subject to the immediate jurisdiction of the regulatory agencies and the courts." Amsterdam v. Goldstick, 136 Misc.2d 946, 947, 521 N.Y.S.2d 203, 204 (App. Term, 1st Dep't 1987). Service by mail at an address registered with a regulatory agency is more likely to provide actual notice than mailing to the last known residence and is more likely to further the State's interest of enforcing housing maintenance regulations since, as the Appellate Term recognized here, "it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves available for personal delivery of notice that they are to be prosecuted for contempt of those orders"

(Pet. App. 5). See also, In re Sasson Jeans, Inc., supra, 83 Bankr. at 217 n.6.

The efficacy of the type of notice given here is demonstrated by these proceedings where the petitioner had actual notice, appeared by counsel and defended.

Thus, the notice required by the New York State statutes to commence a criminal contempt proceeding -- leaving the motion at and mailing it to the address which the building owner himself provides to a housing regulatory agency, more than satisfies the constitutional requirement of "advising" the contemnor of the charges against him. Young v. U.S. ex rel. Vuitton et Fils, S.A., supra, 481 U.S. at 798-99; Cooke v. Unites States, supra, 267 U.S. at 537; see Sterling v. Environmental Control Board of New York City, 793 F.2d 52, 57-58; 58 n. 4 (2d Cir.), rehearing denied, 795 F.2d 8 (2d Cir.), cert. denied sub nom. Environmental

Control Board of the City of New York v. Sterling, 479 U.S. 987 (1986) (the Court made clear that the statutory provision for process that includes mailing a copy to a registered address on file with the City would satisfy the Due Process Clause).

There is no constitutional basis for petitioner's argument (Pet. at 10-11) that a state is required to apply its criminal procedure laws to criminal contempt proceedings for purposes of giving notice of the proceeding so long as the notice affords the requisite opportunity to defend. While contempt proceedings are sufficiently criminal in nature to require many procedural safeguards, they are not intended to punish conduct which is proscribed by the general criminal laws but, instead, seek to preserve respect for the court's authority. Young, 481 U.S. at 800. See Green v. United States, 356 U.S. 165, 186-87 (1958).

Consequently, the procedural requirements set forth in United States v. Tortora, 464 F.2d 1202, 1209 (2d Cir.), cert. den. sub nom. Santoro v. United States, 409 U.S. 1063 (1972) are not applicable where a person has not been indicted for a crime.

Significantly, where a criminal contempt proceeding is brought under Rule 42(b) of the Federal Rules of Criminal Procedure, no formal indictment or other imperatives are required so long as the contemnor has adequate notice. United States v. Martinez, 686 F.2d 334, 345 (5th Cir. 1982). And, the Federal Rules do not require personal delivery. See In re Sasson Jeans, Inc., supra, 83 Bankr. at 217-18.

In Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950), this Court stated, the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for

himself whether to appear or default, acquiesce or contest." However, this Court has also held that it is not a violation of due process to hold a hearing in a criminal contempt proceeding even though the contemnor was not present and to subject him to punishment where the contemnor had "suitable notice and adequate opportunity to appear." Blackmer v. United States, 284 U.S. 421, 440 (1932).

In these proceedings, petitioner had more than "suitable" notice of the criminal contempt proceedings based on his disobedience of court orders requiring him to provide heat and hot water as required by statute. The papers initiating the contempt proceedings included warnings of the seriousness of the charges and the consequences of not appearing. Although petitioner chose not to appear personally in court to defend against these contempt

charges, he sent his attorneys to appear on his behalf to explain his actions and present witnesses. Petitioner received all the process he was due under the Constitution.

(2)

THE JAIL SENTENCES IMPOSED FROM SEVEN SEPARATE CRIMINAL CONTEMPT PROCEEDINGS, INVOLVING SEVEN DIFFERENT BUILDINGS, MAY NOT BE AGGREGATED TO PROVIDE PETITIONER WITH CRIMINAL DUE PROCESS PROTECTIONS TO WHICH HE IS NOT OTHERWISE ENTITLED. IN ANY EVENT, THE SENTENCES IMPOSED ARE EXPRESSLY SUBJECT TO REDUCTION UPON PETITIONER'S APPEARANCE IN COURT.

Petitioner has argued alternatively that, even assuming personal delivery was not required in every criminal contempt proceeding, personal delivery was required here because the one-month jail sentences imposed on the seven separate charges relating to seven different buildings amounted to more than six months (Pet. at 12). That claim is without basis.

An alleged contemnor is entitled to a jury trial for a serious contempt, but not for a petty contempt. Frank v. United States, 395 U.S. 147, 148, rehearing denied, 396

U.S. 869 (1969). In making the determination of whether a crime is serious, federal courts look to the maximum authorized punishment. See, District of Columbia v. Clawans, 300 U.S. 617 (1937). In New York, the Judiciary Law authorizes a maximum sentence of imprisonment of thirty days for criminal contempt. N.Y. Jud. Law, §751(1). A jail sentence of no more than six months is considered petty for purposes of the right to a trial by jury. Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974). As the maximum penalty for criminal contempt in New York is thirty days, the criminal due process protection of trial by jury and other criminal due process protections do not attach. See Bloom v. Illinois, 391 U.S. 194, 211 (1968).

Here there were seven separate proceedings brought to compel the provision of heat and hot water in seven separate

buildings, which resulted in seven separate jail sentences. This fact distinguishes this case from Codispoti, supra, 418 US 506, where this Court held that multiple contempts during the course of a single trial, which resulted in an aggregate sentence exceeding six months, triggers criminal due process protections. Petitioner may not aggregate the seven separate 30-day sentences in seven entirely separate proceedings to obtain due process protections to which he otherwise would not be entitled.

In any event, where multiple contempts are committed during a single trial, this Court has held that a cumulative sentence greater than six months imposed after conviction may be reduced by the State to six months or less rather than retry the contempt with a jury. Taylor v. Hayes, 418 U.S. 487, 496 (1974). Here, the arrest

orders appealed from in each of the proceedings are non-final in that they direct that the petitioner be brought before the court at which time each term of imprisonment may be reduced by the trial court (Resp. App. at A4, A10, A16, A22, A28-A29, A35, A40-41).

Since petitioner may not aggregate his seven different jail sentences for seven different charges pertaining to seven different buildings for purposes of obtaining due process protections applicable to serious criminal proceedings, and, in any event, his sentences may be reduced when he appears in court, he has no basis upon which to demand personal delivery of the criminal contempt charges.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

January 25, 1990

Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel
of the City of New York,
Attorney for Respondent,
100 Church Street
New York, N.Y. 10007
(212) 566-4338

LEONARD J. KOERNER,*
FAY LEOUSSIS,
JANESSA C. NISLEY,
JERALD HOROWITZ,
of Counsel.

*Counsel of Record

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated August 25, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

TONY MORFESIS,

Respondents.

----------x

WARRANT OF ARREST
Index HP-1531/85
Premises:
369 West 126th St.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order finding respondent in contempt of court for failure to comply with Orders entered

December 17, 1985 and January 16, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Lawrence P. Cartelli, of counsel, and Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) TONY MORFESIS was properly served the December 17, 1985 and January 16, 1986 Orders and TONY MORFESIS was properly served with the April 15, 1986 Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated December 19, 1985, January 9, 1986, January 15, 1986, January 25, 1986, January 27, 1986, January 31, 1986, February 11, 1986 and April 18, 1986, the testimony of Herman Coombs, other documentary evidence presented, respondent TONY MORFESIS is found to have failed to comply with the December 17, 1985 and January 16, 1986 Orders, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from December 17, 1985.

b) Supply every bath, shower, washbasin and sink in every dwelling unit with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's December 17, 1985 and January 16, 1986 Orders, in that it was reasonably calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's December 17, 1985 and January 16, 1986 Orders and warrants the imposition of a criminal jail sentence. TONY MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of the court and the court may consider such reduction when TONY MORFESIS is brought before the court pursuant to provisions contained herein. The sentence imposed in

this matter shall be served consecutively to any other sentence imposed by this court upon TONY MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of TONY MORFESIS and bring him before this Court in Part L, 111 Centre St., New York, N.Y., Room 526 for such further disposition as may be ordered by this Court.

If TONY MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of

Corrections and the Department of Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,
J.H.C.

ENTERED:

_____

CLERK OF THE COURT

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated August 25, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

ANDONIS MORFESIS,
EDGECOMBE EQUITIES

----------x

WARRANT OF ARREST
Index HP-1625/85
Premises:
323 Edgecombe Ave.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order finding respondent in contempt of court for failure to comply with Orders entered

January 9, 1986 and January 17, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Lawrence P. Cartelli, of counsel, and Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) ANDONIS MORFESIS was properly served the January 9, 1986 and January 17, 1986 Orders and ANDONIS MORFESIS was properly served with the April 15, 1986 Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated January 25, 1986, and March 21, 1986 the testimony of Inspector Deejen other documentary evidence presented, respondent ANDONIS MORFESIS is found to have failed to comply with the January 17, 1986 Orders, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from January 9, 1986.

b) Supply every bath, shower, washbasin and sink in every dwelling unit with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's January 9, 1986 and January 17, 1986 Orders, in that it was reasonably

calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's January 9, 1986 and January 17, 1986 Orders and warrants the imposition of a criminal jail sentence. ANDONIS MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of the court and the court may consider such reduction when ANDONIS MORFESIS is brought before the court pursuant to provisions contained herein. The sentence imposed in this matter shall be served consecutively to any other sentence imposed by this court upon ANDONIS MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of ANDONIS MORFESIS and bring him before this Court in Part L, 111 Centre St., New York, N.Y., Room 526 for such further disposition as may be ordered by this Court.

If ANDONIS MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of Corrections and the Department of

Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,

J.H.C.

ENTERED:

_____

CLERK OF THE COURT

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated August 25, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

ANDONIS MORFESIS, and
182 E. 122nd ST. EQUITIES,

Respondents.

----------x

WARRANT OF ARREST
Index HP-519/86
Premises:
182 E. 122nd St.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order finding respondent in contempt of court for failure to comply with Order entered March

6, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Michael Stepper, of counsel, and Allison, Kaufman & Greenberg, by L. Jeffrey Roth, appearing in opposition thereto, Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) ANDONIS MORFESIS was properly served the March 6, 1986 Order and ANDONIS MORFESIS was properly served with the June 5, 1986 Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated March 31, 1986, the testimony of Evelyn Ortiz, Hilda Graziani, Margarita Rivera and Inspection Weston, other documentary evidence presented, respondent ANDONIS MORFESIS is found to have failed to comply with the March 6, 1986 Order, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from March 6, 1986.

b) Supply every bath, shower, washbasin and sink in every dwelling unit with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's March 6, 1986 Order, in that it was

reasonably calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's March 6, 1986 Order and warrants the imposition of a criminal jail sentence. ANDONIS MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of the court and the court may consider such reduction when ANDONIS MORFESIS is brought before the court pursuant to provisions contained herein. The sentence imposed in this matter shall be served consecutively to any other sentence imposed by this court upon ANDONIS MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of ANDONIS MORFESIS and bring him before this Court in Part L, 111 Centre St., New York, N.Y., Room 526 for such further disposition as may be ordered by this Court.

If ANDONIS MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of Corrections and the Department of

Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,

J.H.C.

ENTERED:

_____

CLERK OF THE COURT

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated August 25, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

ANTONIO MORFESIS

Respondent.

----------x

WARRANT OF ARREST
Index HP-1536/85
Premises:
541 West 133rd St.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order finding respondent in contempt of court for failure to comply with Orders entered

December 17, 1985 and January 16, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Lawrence P. Cartelli, of counsel, and Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) ANTONIO MORFESIS was properly served the December 17, 1985 and January 16, 1986 Orders and ANTONIO MORFESIS was properly served with the April 15, 1986 Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated December 28, 1985, January 11, 1986, January 27, 1986, January 30, 1986, February 6, February 8, 1986, February 18, 1986, March 11, 1986, the testimony of Herman Coombs, other documentary evidence presented, respondent ANTONIO MORFESIS is found to have failed to comply with the December 17, 1985 and January 16, 1986 Orders, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from December 17, 1985.

b) Supply every bath, shower, washbasin and sink in every dwelling unit with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's December 17, 1985 and January 16, 1986 Orders, in that it was reasonably calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's December 17, 1985 and January 16, 1986 Orders and warrants the imposition of a criminal jail sentence. ANTONIO MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of the court and the court may consider such reduction when ANTONIO MORFESIS is brought before the court pursuant to provisions contained herein. The sentence

imposed in this matter shall be served consecutively to any other sentence imposed by this court upon ANTONIO MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of ANTONIO MORFESIS and bring him before this Court in Part L, 111 Centre St., New York, N.Y., Room 526 for such further disposition as may be ordered by this Court.

If ANTONIO MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of Corrections and the Department of Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,

J.H.C.

ENTERED:

_____

CLERK OF THE COURT

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated August 14, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

24 WEST 132 EQUITIES, INC., and ANDONIS MORFESIS,

Respondents.

----------x

WARRANT OF ARREST
Index HP-1534/85
Premises:
24 West 132nd St.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order

finding respondent in contempt of court for failure to comply with Orders entered December 17, 1985 and January 16, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Lawrence P. Cartelli, of counsel, and Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) ANDONIS MORFESIS was properly served the December 17, 1985 and January 16, 1986 Orders and ANDONIS MORFESIS was properly served with the April 15, 1986

Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated December 29, 1985, January 23, 1986, January 29, 1986, February 13, February 26, 1986, March 6, 1986, March 12, 1986, March 18, 1986, March 21, 1986, March 26, 1986, the testimony of Herman Coombs and Verna Billings other documentary evidence presented, respondent ANDONIS MORFESIS is found to have failed to comply with the December 17, 1985 and January 16, 1986 Orders, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from December 17, 1985.

b) Supply every bath, shower, washbasin and sink in every dwelling unit

with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's December 17, 1985 and January 16, 1986 Orders, in that it was reasonably calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's December 17, 1985 and January 16, 1986 Orders and warrants the imposition of a criminal jail sentence. ANDONIS MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of the court and the court may consider such reduction when ANDONIS MORFESIS is

brought before the court pursuant to provisions contained herein. The sentence imposed in this matter shall be served consecutively to any other sentence imposed by this court upon ANDONIS MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of ANDONIS MORFESIS and bring him before this Court in Part L, 111 Centre St., New York, N.Y., Room 526 for such

further disposition as may be ordered by this Court.

If ANDONIS MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of Corrections and the Department of Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,
J.H.C.

ENTERED:

_____

CLERK OF THE COURT

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated October 8, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

CHANCE EQUITIES, INC.,
ANDONIS MORFESIS and MARIA MORFESIS,

Respondents.

----------x

WARRANT OF ARREST
Index HP-1535/85
Premises:
537 West 133rd St.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order finding respondent in contempt of court for failure to comply with Orders entered

December 17, 1985 and January 16, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Lawrence P. Cartelli, of counsel, and Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) ANDONIS MORFESIS was properly served the December 17, 1985 and January 16, 1986 Orders and ANDONIS MORFESIS was properly served with the April 15, 1986 Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated January 3, 1986, Jauary 18, 1986, January 24, 1986, February 6, 1986, February 8, 1986, February 11, 1986, February 18, 1986, February 28, 1986, March 6, 1986, March 10, 1986, March 11, 1986, March 14, 1986, March 18, 1986, march 20, 1986, April 7, 1986, April 14, 1986, April 17, 1986, April 24, 1986, April 19, 1986, and May 6, 1986, the testimony of Herman Coombs, other documentary evidence presented, respondent ANDONIS MORFESIS is found to have failed to comply with the December 17, 1985 and January 16, 1986 Orders, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from December 17, 1985.

b) Supply every bath, shower, washbasin and sink in every dwelling unit with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's December 17, 1985 and January 16, 1986 Orders, in that it was reasonably calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's December 17, 1985 and January 16, 1986 Orders and warrants the imposition of a criminal jail sentence. ANDONIS MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of

the court and the court may consider such reduction when ANDONIS MORFESIS is brought before the court pursuant to provisions contained herein. The sentence imposed in this matter shall be served consecutively to any other sentence imposed by this court upon ANDONIS MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of ANDONIS MORFESIS and bring him before this Court in Part L, 111 Centre

St., New York, N.Y., Room 526 for such further disposition as may be ordered by this Court.

If ANDONIS MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of Corrections and the Department of Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,
J.H.C.

ENTERED:

_____

CLERK OF THE COURT

ORDER OF THE CIVIL COURT OF THE CITY OF NEW YORK, Dated November 24, 1986 (Denominated a "Warrant")

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART 18L

----------x

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

232 WEST ASSOCIATES, ANDONIS MORFESIS, JOSEPH COLON,

Respondents.

----------x

WARRANT OF ARREST
Index HP-1544/85
Premises:
236-38 W. 149th St.
New York, N.Y.

P R E S E N T :

HON. LEWIS R. FRIEDMAN
J.H.C.

A motion having duly come on before me on April 25, 1986, by an order to Show Cause dated April 15, 1986 for an Order finding respondent in contempt of court for

failure to comply with Orders entered December 17, 1985 and January 16, 1986, petitioner Department of Housing Preservation and Development having appeared by its attorney Bruce Kramer, Esq., Lawrence P. Cartelli, of counsel, and Israel & Krasner by Arthur J. Israel having appeared in opposition thereto.

NOW, upon motion of petitioner, and after filing and reading the aforementioned Order to Show Cause with proof of service thereof, the affirmation of Lawrence P. Cartelli in support of the contempt motion, and after conducting a hearing on the issues.

IT IS HEREBY FOUND THAT:

1) ANDONIS MORFESIS was properly served the December 17, 1985 and January 16, 1986 Orders and ANDONIS MORFESIS was properly served with the April 15, 1986

Order to Show Cause to Punish for Contempt.

2) Upon the DHPD inspection reports dated January 3, 1986, January 11, 1986, January 15, 1986, January 25, 1986, February 6, 1986, February 11, 1986, February 25, 1986, the testimony of Herman Coombs, other documentary evidence presented, respondent ANDONIS MORFESIS is found to have failed to comply with the December 17, 1985 and January 16, 1986 Orders, by failing to:

a) Provide 68° fahrenheit heat in every portion of the premises used for living when the outside temperature fell below 55° during the hours of 6 a.m. and 10 p.m. on each and every day required from December 17, 1985.

b) Supply every bath, shower, washbasin and sink in every dwelling unit

with hot water at a constant minimum temperature of 120° fahrenheit.

3) Such non-compliance constitutes separate and distinct civil contempts of this Court's December 17, 1985 and January 16, 1986 Orders, in that it was reasonably calculated to and actually did defeat, impair, impede and prejudice petitioner by thwarting its efforts to have the subject premises restored to minimum housing standards.

4) Such non-compliance was willful and constitutes separate and distinct criminal contempts of this Court's December 17, 1985 and January 16, 1986 Orders and warrants the imposition of a criminal jail sentence. ANDONIS MORFESIS is to be imprisoned for a period of thirty days in the jail of the county where the court is sitting. Said sentence may be reduced in the discretion of the court and the court may consider such reduction when ANDONIS MORFESIS is

brought before the court pursuant to provisions contained herein. The sentence imposed in this matter shall be served consecutively to any other sentence imposed by this court upon ANDONIS MORFESIS in any other matter.

IT IS HEREBY DIRECTED:

1) That for his criminal contempts of the Court's order for his failure to provide adequate heat and hot water at the subject premises, the Sheriff of the County of New York or the Sheriff of any County within the State of New York or other enforcement officer of any jurisdiction wherein the offender may be found, to whom a certified copy of this Order shall be delivered shall forthwith and without further process take the body of ANDONIS MORFESIS and bring him before this Court in Part L, 111 Centre St., New York, N.Y., Room 526 for such

further disposition as may be ordered by this Court.

If ANDONIS MORFESIS is arrested at a time when the Court is not in session, he is to be lodged with the Department of Corrections and the Department of Corrections shall produce him at 9:30 a.m. when the Court shall next be in session.

SO ORDERED:

_____

HON. LEWIS R. FRIEDMAN,
J.H.C.

ENTERED:

_____

CLERK OF THE COURT

(ORDER OF THE COURT OF APPEALS
DISMISSING APPEAL)

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of September A.D. 1989

PRESENT, HON. SOL WACHTLER,
Chief Judge, Presiding.

Mo. No. 893 SSD 60

In the Matter of the Department of Housing Preservation and Development of the City of New York,

Respondent,

v.

24 West 132 Equities, Inc.,

Respondent,

and Adonis Morfesis,

Appellant.

(Action No. 1)

---

and two additional actions:
Mtr of DHPD v. Chance Equities
(Action No. 2)

Mtr of DHPD v. 232 West Associates
(Action No. 3)

The appellant having filed notices of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeals be and the same hereby are dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the proceedings within the meaning of the Constitution.

Donald M. Sheraw
Clerk of the Court

NEW YORK JUDICIARY LAW

§751. Punishment for Criminal Contempts

1. Except as provided in subdivisions (2), (3) and (4), punishment for a contempt, specified in section seven hundred fifty, may be by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where the punishment for contempt is based on a violation of an order of protection issued under section 530.12 or 530.13 of the criminal procedure law, imprisonment may be for a term not exceeding three months. Where a person is committed to jail, for the nonpayment of fine, imposed under this section, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty

days must be computed from the expiration of the definite time.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.

. . . .

§756. Application to punish for contempt; procedure

An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure

for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred and fifty of the civil practice law and rules or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

WARNING:
YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

New York City Administrative Code:

§27-2097 (formerly D26-41.01)
Registration; time to file

a. The owner of a dwelling required to register under this article shall register with the department in accordance with the provisions of this article.

b. A registration statement shall be filed:

(1) For every existing multiple dwelling. A registration statement filed by the present owner of a dwelling pursuant to the requirements of the prior law shall constitute compliance with this section.

. . . .

(5) Within such time as provided in section 27-2099 of this article, in the case of a change of ownership where registration is required under this article.

c. An owner who is required to register shall file a new registration statement every three years.

d. An owner who is required to register shall file a new registration statement on the registration date assigned to that dwelling by the department whether or not that owner filed a registration statement for that dwelling within the previous three years.

e. The registration date of a dwelling shall be a calendar date and year assigned by the department to that dwelling for the purpose of registration on such date at intervals of three years.

§27-2098 (formerly D26-41.03)
Registration statement; contents

a. The registration statement shall include the following information:

(1) An identification of the premises by block and lot number, and by the street numbers and names of all streets contiguous to the dwelling, or by such other description as will enable the department to locate the dwelling....

(2) An identification of the owner by name, residence and business address. If the owner is a corporation, the identification shall include the name and address of such corporation together with the names, residences and business addresses of the officers....

. . . .

(4) If a dwelling is a multiple dwelling, the number of a telephone within a radius of 50 miles of the city limits where an owner or officer, if the owner is a corporation, or the managing agent may reasonably be expected to be reached at all times. The telephone number contained in the registration statement shall not constitute a public record and shall be accessible only to duly authorized employees or officers of the department and used exclusively by such personnel in connection with an emergency arising on the premises for which the owner

is responsible under the provisions of the multiple dwelling law or this code. The department may promulgate regulations to implement the provisions of this paragraph.

(5) If a dwelling is a one- or two-family dwelling and the owner does not reside within the city, the name and address of a natural person who is over the age of twenty-one years and a resident of the city, designated by the owner to receive service of notices, orders or summonses issued by the department.

b. The registration statement shall be signed by the owner or, if the owner is a corporation, by any officer. In the appropriate case, either the managing agent or the designee described in paragraph five of subdivision a of this section shall sign the statement to indicate consent to the designation except that such consent is not required if an owner or officer of a

corporation is registered as the managing agent.

. . . .

§27-2099 (formerly D26-41.05)
Registration statement; change of ownership or title.

a. When the owner of a dwelling, who is required to register under this article, conveys title to the dwelling to another, the transferor shall, on the day of such transfer, notify the department by regular mail of the name, residence and business address of the new owner, or, if the new owner is a corporation, of the name and address of such corporation. The registration statement in accordance with section 27-2098 of this article shall be presented by the new owner to the office of the register of the city of New York, or the county clerk as rquired by subdivision c of this section if such owner records such

deed, or to the department if the deed is not recorded, and in no event more than five days from the date of taking of title; however, the failure by a new owner to file such registration statement shall not impair the validity of his or her title.

b. When the ownership of a dwelling changes by operation of law, the new owner, is required to register, shall file a registration statement in accordance with section 27-2098 of this article not more than thirty days from the date that the title devolved upon him or her.

. . . .

§27-2100 (formerly D26-41.07)
Registration Statement; change of address

An owner, who is required to register under this article, shall inform the department and shall amend his or her registration statement within five days if there is a change of address of the owner, a

change in the list of officers of the owner corporation, or a change of address of any of such listed officers. A filing fee of five dollars shall be required for the amended registration statement.

No. 89-1020

In The

Supreme Court of the United States

October Term, 1989

ANDONIS MORFESIS,

Petitioner,

v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The New York Supreme Court, Appellate Division, First Department

REPLY BRIEF FOR PETITIONER

HERALD PRICE FAHRINGER
Counsel of Record
DIARMUID WHITE
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
540 Madison Avenue
New York, New York 10022
(212) 751-1330

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

Although in the argument portion of its brief Respondent does not contend that Petitioner waived his jurisdictional claims, in its "Counter-Statement of the Case" Respondent makes a number of allusions to a purported waiver. Respondent's brief also indicates that Petitioner had "actual notice" of the contempt proceedings, and appeared and defended by counsel. This reply addresses only those assertions.

1. Respondent maintains that under New York Civil Practice Law and Rules ["CPLR"] § 3211(e) Petitioner waived objections to personal jurisdiction in six of the seven contempt proceedings based on his failure timely to assert them by written answer or motion. (Brief in Opposition at 6)

In the proceedings referred to, no written notice of appearance, answer or motion to dismiss pursuant to CPLR § 3211 was served or filed. Rather, on the return date of the orders to show cause, counsel appeared in the Housing Part ostensibly on behalf of all the respondents, and the matter was set down for trial. Respondent Department of Housing Preservation and Development of the City of New York ("HPD") neither contested this procedure nor sought a default judgment based on any failure to serve and file responsive papers. At the contempt trials, counsel moved orally to dismiss for lack of personal jurisdiction. The court fully addressed the motion on the merits and denied it. In its post-trial opinion, the court raised *sua sponte* the question of waiver, but determined that, "although no formal answer was served," New York caselaw "probably permits it to be raised even though not pleaded." (App. 15) On Petitioner's appeal to the Appellate Term, HPD did not contend that his jurisdictional claim had been waived by failure to assert it in a responsive pleading, and the Appellate Term fully addressed the claim on the merits. Thus, the New York courts found no waiver of Petitioner's jurisdictional claim.

2. Petitioner disputes that he "appeared" in the contempt proceedings since, under New York law, "the defendant appears by serving an answer or a notice of

appearance or by making a motion which has the effect of extending the time to answer," CPLR § 320(a), and no such answer, notice or motion was served here. Even if the attorney's appearance in court satisfied CPLR § 320, there is no indication that the attorney who appeared on behalf of all the respondents, including corporate ones, was expressly or implicitly authorized to appear on behalf of Petitioner personally. *See Skyline Agency, Inc. v. Coppotelli,* 117 A.D.2d 135, 502 N.Y.S.2d 479 (2d Dept. 1986) (where defendant was never personally served with process and neither expressly nor implicitly conferred authority on attorney who appeared on behalf of all defendants, jurisdiction was lacking).

It is true, as Respondent states, that counsel appeared on behalf of Petitioner personally at the sentencing hearing. But, first, this was *after* Petitioner had been adjudicated in civil and criminal contempt and after the court had stated, in its written opinions, that a jail sentence would be imposed. (App. 18, 23, 29) Second, at the sentencing hearing counsel appeared solely to make an application for a four-week adjournment so that Petitioner could complete arrangements for retaining an attorney experienced in criminal matters to represent him, in light of the imminent sentences of incarceration, and appeared without Petitioner because of prospective counsel's concern that Petitioner's personal appearance might waive his jurisdictional challenge. (Transcript of Sentencing Hearing at 11-14.)

3. Nowhere in the record, prior to the sentencing hearing, is there any indication that Petitioner had "actual notice" of the contempt proceedings.

For these reasons, and those stated in the petition, a writ of certiorari should be granted.

Dated: New York, New York
January 30, 1990

Respectfully submitted,

HERALD PRICE FAHRINGER
Counsel of Record
DIARMUID WHITE
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
540 Madison Avenue
New York, NY 10022
(212) 751-1330

Attorneys for Petitioner